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Supreme Court of the United States

OCTOBER TERM, 1954

No. 145

CARLOS MARCELLO, PETITIONER,

vs.

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 17, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

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DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 854 Miscellaneous

UNITED STATES OF AMERICA EX REL
CARLOS MARCELLO

versus

EDWARD J. AHRENS, Officer in Charge,
United States Immigration and Naturalization Service.

APPEARANCES:

Wm. C. Orchard, Esq.,
Attorney for Petitioner

John N. McKay
United States Attorney

Appeal from the District Court of the United States for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 8th day of June, 1953, at the City of New Orleans, Louisiana.

Extension of time granted by the Honorable United States District Court, Eastern District of Louisiana, bringing the return day up to and including September 6, 1953.

PETITION FOR WRIT OF HABEAS CORPUS

(Number and Title Omitted)

Filed: June 2, 1953

To the Honorable The Judges of the Unisted States District Court for The Eastern District of Louisiana:

The Petition of Carlos Marcello for a writ of habeas corpus respectfully shows:

I.

That your petitioner was arrested under a final order of deportation by the respondent herein on June 2, 1953, and is being unlawfully and illegally restrained of his liberty under color of authority of said order of deportation, as will hereinafter be shown.

II.

That petitioner was arrested on a warrant of arrest on December 30, 1952, which warrant charged that petitioner had violated the provisions of Section 1251(a) 11, Title 8, U. S. Code, in that the Immigration and Nationality Act of 1952 in that;

A. The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of law relating to the illicit traffic in narcotic drugs, to-wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress.

B. The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marijuana, to-wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress.

That on February 16, 1953, a hearing was had before the Special Inquiry Officer of the Immigration and Naturalization Service who, after a hearing over the objection of your petitioner, entered on February 20, 1953 an order of deportation against your petitioner upon the following grounds:

1. That under Section 241(a) (11) of the Immigration and Nationality Act of 1952, the respondent is subject to deportation in that he has been convicted of the violation of a law relating to the illicit traffic in narcotic drugs, to-wit: The Marihuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th. Congress;

2. That under Section 241(a) (11) of the Immigration and Nationality Act of 1952, the petitioner is subject to deportation in that he has been convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihaana, to wit: The Marihuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th. Congress.

III.

That petitioner appealed said order of deportation to the Board of Immigration Appeals, which on June 2, 1953, affirmed the said order of deportation.

IV.

That petitioner entered the United States for permanent residence at New Orleans, Louisiana, on October 7, 1910, when he was eight months old, and has been continuously in the United States except for a one-hour visit to Mexico in 1937 or 1937; that petitioner is married to an American citizen and is the father of four children.

V.

That on October 29, 1938, petitioner was sentenced in this Court on his plea of guilty to a violation of the Marihuana Tax Act of 1937, in two counts, on which he received a general sentence of one year and one day which he served in the United States Penitentiary at Atlanta, Georgia.

VI.

That the final order of deportation is null and void and of no legal effect, and the restraint of petitioner under the color of such order of deportation is illegal and without warrant in law for the reasons hereinafter set forth.

VII.

That at the hearing before the Special Inquiry Officer

on February 16, 1953, petitioner objected to the entire proceeding on the ground that Section 1252(b), Title 8 of the United States Code, was unconstitutional, null and void as being violative of the due process clause of the Fifth Amendment of the Constitution of the United States, in that it did not meet the requirements or standards for fairness and impartiality required in a hearing, and further, that said section was violative of the Administrative Procedure Act (Title 5, U. S. Code, Sec. 1001 to 1011, particularly Sec. 1004(c)).

VIII.

That it was held in the case of Wong Yang Sung v. McGrath, that deportation proceedings were subject to the Administrative Procedure Act; that after said decision a rider to the Appropriations Bill in 1950 exempted deportation hearings from the Administrative Procedure Act, but this rider was repealed by Section 403 (42) of the Immigration and Nationality Act of 1952, and such exemption no longer exists; that it was further held in the case of Kwong Haichew v. Colding, et al, 73rd. Supreme Court Reporter, 478, decided February 9, 1953, that "when the Constitution requires a hearing it requires a fair one before a tribunal which meets at least currently prevailing standards of impartiality."

IX.

Section 1252(b), Title 8, U. S. Code, provides that "the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." The section further provides:

"A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall made determinations, including orders of deportation."

"No speical inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions *or in which he shall have participated (except as provided in this subsection in prosecuting functions.*"

The above quoted sections plainly show that investigative and prosecuting functions are combined with adjudicating functions in violation of the currently prevailing standards of fairness and impartiality.

X.

The section is further unconstitutional in that the special inquiry officer is subject to and responsible to the supervision and control of other officers, agents and employees of the service engaged in the performance of investigative and of prosecutive functions of the agency, and in fact is by the very terms of the act subject to the supervision of the highest enforcement officer in the United States, namely, the Attorney General, and this is plainly shown by Section 101, Paragraph 40 (4) of the Immigration and Nationality Act of 1952 defining a "special inquiry officer", which reads as follows:

"(4) The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this act, as the Attorney General sahll prescribe."

XI.

The section of the law placing the inquiry officer under the supervision of the Attorney General is violative of the currently prevailing standards of fairness and impartiality in hearings, and is violative of the due process clause of the Fifth Amendment of the United States, and particularly in this case, where there has been injurious and prejudicial publicity to your petitioner, as will be shown by the record herein.

That on the day of the arrest of your petitioner the then Attorney General announced in a public statement both in Washington and in New Orleans that your petitioner was an undesirable citizen and had been guilty of many crimes, and that the proceedings were specially designed to deport petitioner.

That such publicity was bound to have great effect upon the special inquiry officer, and it must be remembered that these objections were made before any hearing and that the hearings were held subject to such objections.

XII.

That the petitioner is further informed and believes that the Attorney General sometime in 1952 prepared a list of 152 persons whom he desired to deport, and that your petitioner's name was included on this list.

XIII.

That Section 1251(a) (11), Title 8, U. S. Code reads as follows:

> "Any alien in the United States, shall, upon the order of the Attorney General be deported who (11) *at any time* has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation of *** marihuana ***."

And Paragraph (b) of the same section reads as follows:

> "Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the cla[illegible]-

es enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occured prior to the date of enactment of this Act."

XIV

That both of said sections are violative of Article 1, Section 9, Clause 3 of the Constitution of the United States providing "no bill of attainder or ex post facto law shall be passed" (by Congress). An ex post facto law has been defined in the case of Burgess v. Salmon, 97 U.S. 331 (1878) as follows:

> "An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed. Carpenter et al v. Commonwealth of Pennsylvania, 17 How. 456."

XV

That petitioner was convicted on October 29, 1938, of a violation of the Marihuana Tax Act of 1937 and sentenced to serve a year and a day in the Federal Penitentiary, served said sentence, and was discharged; that the penal provisions of said Marihuana Act provided for a fine or imprisonment or both; that at the time of the conviction of petitioner a violation of the Marihuana Act of 1937 was not included among the deportable offenses set out o in

JUDGMENT

(Number and Title Omitted)

Minute Entry

June 8th, 1953

Wright, J:

This cause came on at a former day to be heard on the application of the relator for a Writ of Habeas Corpus herein and was argued by counsel for the respective parties and submitted when the Court took time to consider;

Now on due consideration thereof and for the written reasons of the Court on file herein;

IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT that the deportation order issued in this case is declared valid and the Writ of Habeas Corpus is hereby DISCHARGED.

IT IS FURTHER ORDERED BY THE COURT that the relator be released on $10,000.00 bail in the event an appeal is taken herein.

(Sgd.) J.S.W.

phases of the case. Nor does it appear that the special inquiry officer was controlled in any way by his superiors in the Bureau or in the Department of Justice in conducting the hearing or in reaching his decision.

Relator's contention that Section 241(a)11 of the Immigration and Nationality Act of 1952 is an unconstitutional ex post facto law is also without merit. It is true that Congress by passing Section 241(a)11 made a conviction "at any time" concerning marihuana ground for deportation. Thus the statute has retroactive effect. But the ex post facto clause of the Constitution applies only to criminal proceedings, *Calder* v. *Bull*, 3 U. S. 386, 390; *Johannessen* v. *United States*, 225 U. S. 227, 242, and deportation is not a criminal proceeding. *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Carlson* v. *Landon*, 342 U. S. 524, 537. The precise contention here made was rejected in *Mahler* v. *Eby*, 264 U. S. 32, and *Harisiades* v. *Shaughnessy*, 342 U. S. 580, is to the same effect.

The deportation order is valid. The writ of habeas corpus is discharged. In view of the fact that the government is not opposing relator's release on bail pending appeal, he may be released on $10,000 bail, in the event an appeal is taken from this ruling.

(Sgd.) J. SKELLY WRIGHT
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana,
June 8th, 1953.

by or designated pursuant to statute."[6] And, to make the matter crystal clear, Section 242(b) states that "the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."[7]

The relator makes no contention that his deportation hearing did not conform to the requirements of Section 242 (b). His contention is the procedure outlined in Section 242(b) is violative of due process in that it is not in accord with the Administrative Procedure Act. His claim of improper procedure, however, would seem to be largely academic. He does not deny his conviction under the Marihuana Tax Act.[8] Since such conviction alone is the basis for his deportation, no amount of due process would help him.

In any event, his contention concerning lack of due process is not well founded. Section 242(b) meets the requirements of due process and the record of the hearing shows that the procedure provided in Section 242(b) was meticulously followed. Marcello was accorded every safeguard. He had notice of the charges and of the hearing; he was represented by counsel; he was allowed to cross-examine the Bureau's witnesses; he was allowed to present evidence in his own behalf. Further, there is no indication that the special inquiry officer conducting the hearing had previously participated in the investigative or prosecutive

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6 Section 7 (5 U.S.C. Sec. 1006 (a)).

7 In *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, the Supreme Court held that Congress intended the Administrative Procedure Act to apply to deportation proceedings. Since that decision Congress, by rider to an appropriation bill, excepted deportation and exclusion procedures from the Administrative Procedure Act. The Immigration and Nationality Act repealed the rider and substituted therefor the language quoted in the text of this opinion.

8 Nor could he. The conviction was before this court.

officer to present the evidence on behalf of the United States at the hearing but that such assignment shall not in any way diminish the authority conferred upon the special inquiry officer conducting the proceedings. It provides also that no special inquiry officer shall conduct a proceeding in any case in which he shall have theretofore participated in investigative or prosecutive functions. This section further provides that the alien shall be given reasonable notice of the nature of the charges against him and the time and place in which the proceedings shall be held; that the alien shall have the right to counsel; that the alien shall have reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, to cross-examine witnesses presented by the government, and that no decision of deportability shall be valid unless based upon reasonable, substantial, and probative evidence.

The procedure as outlined in Section 242(b) provides due process of law. In addition to the usual safeguards of due process, it guarantees the alien a fair hearing, one before an executive tribunal which meets currently prevailing standards of impartiality. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33,50. It is true that the procedure under Section 242(b) varies in some particulars from the procedure under the Administrative Procedure Act. But the Administrative Procedure Act alone is not the sole criterion of due process of law. The Constitution in providing for due process does not require a single procedure applicable in all cases. Nor has Congress adopted one. The Administrative Procedure Act itself provides that the procedure outlined therein does not apply to "the conduct of special classes of proceedings in whole or in part by or before boards or other officers specially provided for

On February 20, 1953 an order of deportation was issued by that officer. The deportation order was based on the grounds stated in the warrant of arrest. Marcello appealed to the Board of Immigration Appeals and on June 1, 1953 that board affirmed the decision of the special inquiry officer. His re-arrest followed on June 2nd.

Referring first to relator's claim of lack of due process, it is clear that an alien who is a lawful permanent resident of the United States is entitled to the protection of the Fifth Amendment. He may not be deprived of his right to remain in this country until his deportability is established by due process of law. *The Japanese Immigrant Case*, 189 U. S. 86, 100-101; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49-50; *Kwong Hai Chew v. Colding*, 344 U. S. 590, 598. With respect to deportation proceedings, due process of law means that the alien is entitled to notice of the nature of the charge against him and a hearing thereon at least before an executive or administrative tribunal. *The Japanese Immigrant Case*, supra; *Kwong Hai Chew* v. *Colding*, supra. And "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33,50.

Section 242(b) of the Immigration and Nationality Act provides that proceedings to determine deportability shall be conducted by a special inquiry officer who shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses and, as authorized by the Attorney General, make determinations including orders of deportation. It also provides that the Attorney General may assign an additional immigration

ality. He is now 43 years old and has resided in the United States since October 7, 1910. On October 29, 1938, he was sentenced to imprisonment for a term of one year and one day following his conviction on a plea of guilty to an indictment containing two counts. The first count charged that on or about December 6, 1937 he feloniously transferred to another individual a quantity of marihuana which transfer was not made pursuant to a written order on the required form in violation of the Marihuana Tax Act of 1937.[3] Count two charged a similar unlawful transfer of marihuana on or about December 19, 1937.

Marcello was first arrested by the Bureau of Immigration and Naturalization on December 30, 1952 under a warrant which charged a violation of Section 241(a)11[4] of the Immigration and Nationality Act of 1952 in that he was convicted of a violation of a law relating to the illicit traffic in narcotic drugs and in that he was convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marihuana. After his release on bail, Marcello was given a hearing before a special inquiry officer pursuant to the provisions of Section 242(b)[5] of the Immigration and Nationality Act.

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3 26 U.S.C. Sec. 2591.

4 "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who —

* * * * *

is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;" (8 U.S.C. Sec. 1251(a) 11).

5 8 U.S.C. Sec. 1252(b).

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ORDER OF COURT DISCHARGING WRIT OF HABEAS CORPUS

(Number and Title Omitted)

Filed: June 8, 1953

William C. Orchard
Attorney for Petitioner

John N. McKay
United States Attorney
Attorney for Respondent

WRIGHT, District Judge:

This habeas corpus proceeding was brought to test the validity of an order of deportation issued pursuant to the provisions of the Immigration and Nationality Act of 1952.[1] Relator attacks the constitutionality of Section 242(b) of that act on the ground that the deportation procedure provided therein denied him due process of law in that it is contrary to the procedure prescribed in the Administrative Procedure Act.[2] Relator makes the additional contention that the conviction on which the order of deportation is based occurred in 1939 and such conviction was not made a basis for deportation until the Immigration and Nationality Act was passed in 1952.

Carlos Marcello, a native of Tunisia, is of Italian nation-

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[1] Habeas corpus is the proper remedy. *Heikkila* v. *Barber*, 345 U. S. 229.
[2] 5 USC Sec. 1001, *et seq*

REPORTER'S TRANSCRIPT

(Number and Title Omitted)

Filed: August 12, 1953

APPEARANCES:

John N. McKay, Jr., Esq., United States Attorney,
For United States of America.

William C. Orchard, Esq.,
Attorney for Carlos Marcello.

MR. ORCHARD:

Counsel for petitioner, Carlos Marcello, offers, introduces and files in evidence the entire record annexed to the return, and rests.

MR. McKAY:

The government rests.

(Argument).

THE COURT:

The record from the Board of Immigration Appeals has just been filed today, and the Court has not had chance to read and study it. Because of the nature of this case, the Court will render a decision in the matter later.

MINUTE ENTRY

June 5th, 1953

Wright, J:

(Number and Title Omitted)

This cause came on this day for hearing on petition for release from custody on writ of habeas corpus.

Present:

William C. Orchard,
Attorney for Petitioner;

John N. McKay,
United States Attorney;

Counsel for the petitioner offered various documents and rested.

Counsel for the United States also rested.

After hearing argument by counsel for the respective parties, the matter was submitted and the Court took time to consider.

ly found deportable under Section 241 of the Immigration and Nationality Act (8 USC 1251) on the following grounds:

(a) That he has been convicted of a violation of a law relating to the illicit traffic in narcotic drugs, and

(b) That he has been convicted of a violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marihuana.

WHEREFORE, respondent prays that these proceedings be dismissed so that the order of deportation may be executed.

(Sgd.) JOHN N. McKAY
JOHN N. McKAY
United States Attorney
239 Post Office Building
New Orleans 12, Louisiana

1.

That the petitioner is an alien.

2.

That the respondent is the Officer in Charge of the New Orleans Office of the Immigration and Naturalization Service, Department of Justice, and has custody of the petitioner pursuant to an order of deportation issued by Fred P. McCleskey, Special Inquiry Officer of the Immigration and Naturalization Service, Department of Justice, which order of deportation was affirmed by the Board of Immigration Appeals of the Department of Justice on June 2, 1953.

3.

That the official record file No. A2669541 of the Immigration and Naturalization Service, Department of Justice, relating to the petitioner and containing the full record of his deportation proceeding is attached to this return and made a part hereof; that this Honorable Court is requested as a part of its order disposing of the present proceeding to direct the return of such official record to the respondent.

4.

That the deportation hearing of the petitioner was conducted in accordance with the constitution, laws and regulations of the United States, and that petitioner was proper-

ORDER

Let the writ of habeas corpus issue as prayed for, returnable before this Court on June 4th, 1953 at the hour of 2 O-clock P.M.

(Sgd.) J. SKELLY WRIGHT
JUDGE

New Orleans, Louisiana
June 2, 1953.

RETURN TO WRIT OF HABEAS CORPUS

(Number and Title Omitted)

Filed: June 5, 1953

To the Honorable J. Skelly Wright, Judge of The United States District Court for The Eastern District of Louisiana:

Comes now the respondent in answer to the writ of habeas corpus issued by this Court on the 2nd day of June, 1953, and in accordance with Title 28 Section 2243 United States Code, certifies that the cause of the detention of the petitioner is as follows:

(Sgd.) WM. C. ORCHARD
WM. C. ORCHARD,
204 Queen & Crescent Building,
New Orleans 12, Louisiana.

ATTORNEY FOR PETITIONER.

STATE OF LOUISIANA
PARISH OF ORLEANS

Personally came and appeared the undersigned authority Carlos Marcello who being duly sworn deposes and says;

That he is the petitioner named in the foregoing petition for Writ of Habeas Corpus.

That he has read the same and the facts and allegations contained therein are true and correct to the best of his knowledge, information and belief and that said petition is filed in good faith and that he believes that he is entitled to the redress therein sought.

(Sgd.) CARLOS MARCELLO
CARLOS MARCELLO

Sworn to and subscribed to
before me this 2nd day
of June, 1953.
(Sgd.) V. J. THIBERVILLE
Notary Public

reasons, his detention by the respondent herein under color of the authority of the final order of deportation, and the consequent restraint of his liberty is illegal, unlawful and without warrant in law, and that he should be released forthwith.

XXII.

That no previous application has been made to this or any other Court for the writ herein sought, or for similar relief.

XXIII.

That the original record is in the hands of the Board of Immigration Appeals, or the respondent herein, and petitioner calls for production of such records.

XXIV.

That said respondent is within the jurisdiction of this Court.

WHEREFORE, petitioner prays that the Writ of Habeas Corpus issue in terms of the law directed to the respondent requiring him to produce the body of the said Carlos Marcello on a time and place designated by said Court, and that upon a hearing thereof petitioner be discharged from said unlawful custody and restraint.

And for such other and further relief as may be necessary in the premises.

prohibiting the enactment of an ex post facto law.

XIX.

That the deportation order is based upon a finding that petitioner first violated a law relating to illicit traffic in narcotic drugs, and second, violated a law governing or controlling the taxing, etc. of marihuana; that petitioner was convicted upon two counts and was given a general sentence; that the finding of the special inquiry officer was illegal, null and void, and it was held in the case of Vautrot vs. United States, 8th. Circuit, 144 Fed. 2d. 41, that a general sentence does not presume that it is upon any particular counts, but is one sentence and one conviction.

XX.

Petitioner further shows that on March 3, 1953, petitioner made application for a suspension of deportation on the ground that more than ten years had elapsed since the commission of the act constituting ground for deportation, and that he had been a person of good moral character during that time, and that the case be reopened in order to allow petitioner to make such proof as was necessary for suspension, which suspension was denied on the ground that petitioner had refused to apply for such suspension at the hearing on February 16, 1953, and which action of the special inquiry officer was illegal, arbitrary and capricious.

XXI.

Petitioner further avers that for all of the above set forth

Section 156 (a), Title 8, U. S. Code; that on June 28, 1940, Congress amended said Section 156 (a) and added convictions on marihuana laws to the other deportable offenses; that further, section 22 of said Act of June 28, 1940, provided that no alien should be deported by reason of said amendment of 1940 on account of any act committed prior to June 28, 1940.

XVI.

That consequently at the time of his conviction there was no law authorizing the deportation of petitioner and even after the admendment of June 28, 1940, petitioner was specifically exempt from the deportation provisions of said amendment and has thus enjoyed congressional immunity and pardon from deportation for a period of over twelve years.

XVII.

That petitioner was caught completely unawares by the enactment of the Immigration and Nationality Act of 1952, and he was not adequately forewarned of the consequences of his prohibitive acts, and the effect of the enactment of these particular sections of the 1952 law is to provide a retroactive effect and add a penalty to the law under which petitioner was convicted.

XVIII.

That therefore the said sections upon which the final order of deportation are based are violative of Article 1, Section 9, Clause 3 of the Constitution of the United States

NOTICE OF APPEAL

(Number and Title Omitted)

Filed: June 8, 1953

Notice is hereby given that Carlos Marcello, petitioner herein, hereby appeals to the United States Court of appeals for the Fifth Circuit from the final judgment discharging a writ of habeas corpus, entered in this action on June 8th, 1953.

(Sgd.) WM. C. ORCHARD
WM. C. ORCHARD
204 Queen & Crescent Bldg.
New Orleans, 12, Louisiana
Attorney for Appellant.

BAIL BOND PENDING APPEAL

(Number and Title Omitted)

Filed: June 9, 1953

Know All Men By These Presents:

That we Carlos Marcello as principal, and Carolina Casualty Insurance Co. as sureties, are held and firmly bound unto the United States of America _____

in the sum of Ten Thousand to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of June, in the year of our Lord One Thousand Nine Hundred and fifty three.

WHEREAS, lately at the May TERM, A.D. 1953, of the District Court of the United States for the Eastern District of Louisiana, in a suit pending in said Court between the United States of America, plaintiff, and Carlos Marcello defendant, a judgment and sentence was rendered against the said Carlos Marcello, and the said Carlos Marcello has filed a notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit to reverse the judgment and sentence in the aforesaid suit, and a copy of said notice of appeal directed to the said United States of America, has been duly served.

Now, the condition of the above obligation is such, that if the said Carlos Marcello shall appear in the United States Circuit Court of Appeals for the Fifth Circuit at the City of New Orleans on the 9th day of June, A.D., 1953, and from day to day thereafter during said term, and from term to term thereof, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Fifth Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence of the said District Court against him shall be affirmed by the said

United States Circuit Court of Appeals for the Fifth Circuit, then the above obligation to be void, else to remain in full force, virtue and effect.

(Sgd.) CARLOS MARCELLO (SEAL)
355 Huey P Long Ave-
Gretna, La.

CARCLINA CASUALTY
INS. CO. (SEAL)
(Sgd.) By ED. H. LITOLFF (SEAL)
Attorney in Fact
2741 Tulane Ave. Surety

Taken and acknowledged before me
on the day and year first above written.
(Sgd.) R. H. CARTER, JR.
United States Commissioner
Eastern District of Louisiana.
(SEAL)

MOTION & ORDER TO TRANSMIT EXHIBITS IN THEIR ORIGINAL FORM

(Number and Title Omitted)

Filed: July 27, 1953

Mover moves the Court for an order directing the Clerk to include in the record on appeal, in their original form, all exhibits filed in this case, which are essential to the con-

sideration of questions presented on appeal. Because of their voluminous nature it would be quite expensive to include them in the printed record.

(Sgd.) WM. C. ORCHARD
ATTORNEY FOR MOVER

ORDER

On motion of Mover-Appellant herein, IT IS ORDERED that all exhibits filed in this case be made part of the record and forwarded to the Court of Appeals in their original form.

New Orleans, La.
July 28, 1953

(Sgd.) HERBERT W. CHRISTENBERRY
JUDGE.

DESIGNATION OF RECORD BY APPELLANT

(Number and Title Omitted)

Filed: August 13, 1953

Appellant, Carlos Marcello, through his counsel of record, Wm. C. Orchard Esq., hereby designates the following portions of the record to be included in the transcript of appeal:

1. Petition for Writ of Habes Corpus.
2. Order issuing Writ of Habeas Corpus.
3. Return of Respondent to Writ of Habeas Corpus.
4. Transcript of Hearing June 5, 1953.
5. Judgment of District Court, June 8, 1953, discharging writ of habeas corpus and fixing bail pending appeal.
6. Notice of Appeal.
7. Bail Bond.
8. Exhibit of Appellant and Respondent (to be transmitted in original).
9. This designation.

(Sgd.) WM. C. ORCHARD
WM. C. ORCHARD
204 Queen & Crescent Bldg.
New Orleans, 12, Louisiana
Attorney for Appellant,
Carlos Marcello.

CLERK'S CERTIFICATE

I, A. Dallam O'Brien, Jr., Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify the foregoing 30 pages to contain a true and correct copy of the record in the case entitled "United States of America Ex Rel Carlos Marcello -versus- Edward J. Ahrens, Officer in Charge, United States Immigration and Naturalization Service" No. 854 of the Miscellaneous Docket of this Court as made up in accordance with the Designation of Record copied herein.

Witness my hand and the seal of said Court at the City of New Orleans, Louisiana, this 25th day of August, 1953.

A. DALLAM O'BRIEN, JR.,
Clerk

By (Sgd.) Andrew J. Bacon
Deputy Clerk

[fol. 32] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

CARLOS MARCELLO

versus

EDWARD J. AHRENS, Officer in Charge, United States Immigration and Naturalization Service

MINUTE ENTRY OF ARGUMENT AND SUBMISSION, DATED JANUARY 20TH, 1954, OMITTED IN PRINTING

[fol. 33] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14718

CARLOS MARCELLO, Appellant,

versus

EDWARD J. AHRENS, Officer in Charge, United States Immigration and Naturalization Service, Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

OPINION—Filed May 6, 1954

Before Borah and Russell, Circuit Judges, and Dawkins, District Judge

RUSSELL, Circuit Judge:

Carlos Marcello, a resident alien, was arrested and taken into custody by the United States Immigration Inspector at New Orleans, Louisiana, on December 30, 1952, under a warrant issued pursuant to section 242 [1] of the Immigration and Nationality Act of 1952.[2] The warrant charged specifically that Marcello was subject to be deported under

[1] 66 Stat. 208, 8 U. S. C. A. 1252(a).

[2] 66 Stat. 166, 8 U. S. C. A. 1101, et seq.

[fol. 34] section 241(a)(11) of the Act[3] for the reasons set forth in the margin.[4] Pending a hearing, which was three times continued, the alien was released under bond. The hearing was held at New Orleans on February 16, 1953, at which time the alien interposed objections to further proceedings on constitutional grounds. During the course of the hearing the special inquiry officer advised the alien, through his counsel, of his right to apply for a suspension of deportation,[5] which application must be made during the hearing, according to applicable regulations.[6] Counsel stated that the alien did not wish to apply for such relief. The decision and order of the special inquiry officer, rendered February 20th, held that Marcello was deportable for the reasons stated in the warrant and ordered that he be deported from the United States in the manner provided by law.

After rendition of the decision and order of deportation, the alien filed a motion to reopen the hearing to permit him to apply for discretionary relief by suspension of deportation. This motion was denied by the special inquiry officer on the ground that "the motion failed to state any new facts to be proved at the reopened hearing." In argument before the Board of Immigration Appeals the alien renewed [fol. 35] his claim of deprivation of constitutional process and in addition urged that his motion to reopen the hearing should be granted, "unless the Government is prepared to

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[3] 8 U. S. C. A. 1251(a)(11).

[4] "The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of a law relating to the illicit traffic in narcotic drugs, to wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress.

"The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marijuana, to wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress."

[5] 8 U. S. C. A. 1254(a)(5).

[6] 8 C. F. R. 242.54(d).

waive that technical objection and permit the application for suspension to be considered by the Board."

The Board of Immigration Appeals overruled the alien's objections to the proceedings before the special inquiry officer and his attacks against the constitutionality of such proceedings, but accepted his proposal to consider his application for discretionary relief on the record made before the hearing officer It conceded arguendo that the alien could establish an "'exceptional and extremely unusual hardship' case" and his "good moral character" and that he would be able to establish all of the requirements essential to the invocation of its discretion,[7] but, for reasons[8]

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[7] Footnote 5, supra.

[8] "As against any evidence that he might present, there are the record of his conviction in 1938 for two transfers of bulk marihuana, totaling 380 ounces (Ex. 4); a Federal Bureau of Investigation Report (Ex. 5) which shows that he was arrested on several occasions, that most of the charges were dismissed but that in 1930 he was sentenced to nine to fourteen years for assault and robbery for which offenses he was pardoned on July 25, 1935; clippings from newspapers published in New Orleans, Louisiana, (Ex. 7) which the respondent's own counsel submitted and which refer to the respondent as a racketeer, 'number one mobster in Louisiana,' etc.; and his refusal to testify before the Kefauver Committee.

"With respect to the latter matter, the respondent was found guilty in the District Court for the Eastern District of Louisiana on six counts of an indictment charging contempt of the United States Senate for refusing to answer certain questions before a Senate sub-committee. He had refused to answer 166 questions on the ground that the answers would tend to incriminate him, but at the trial he was found not guilty on all but six counts relating to six questions. On appeal, his conviction was reversed and a judgment of acquittal was rendered. [Marcello v. United States, 5 Cir., 196 F. 2d 437]. In *Mahler v. Eby, supra*, [264 U. S. 32], at p. 42, the Supreme Court, in discussing the question of what evidence would warrant the finding that an alien was an undesirable resident, clearly indicated

[fol. 36] stated in its decision, the Board declined to grant such relief. The appeal was dismissed.

On June 2, 1953, the alien petitioned the district court for the writ of habeas corpus. The writ was issued and on June 5, 1953, a hearing was held at which time the alien offered in evidence the official record of the Immigration and Naturalization Service containing the full record of his deportation proceedings and rested without offering further evidence in support of the allegations of his petition. The district court, in an able memorandum opinion,[9] held the deportation order valid and accordingly entered judgment discharging the writ. From the order of dismissal Marcello has taken this appeal.

There is no question but that under section 241(a)(11), *supra*, Marcello is subject to deportation. He does not deny that in October, 1938, he was convicted, on his plea of guilty to an indictment containing two counts, of violating the [fol. 37] Marihuana Tax Act of 1937.[10] However, it is con-

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that the refusal of an alien to answer questions was an attitude from which it might well be inferred that what would be revealed by the answers would not add to the alien's desirability as a resident. Similarly, we believe that in the respondent's case, although he was acquitted by the appellate court, his refusal to answer questions on the ground that the answers might incriminate him does not indicate that he is a desirable resident. Section 244(a) specifically provides that 'the Attorney General *may, in his discretion*, suspend deportation * * *'. It is our considered opinion that the respondent's case is not one which merits the discretionary relief of suspension of deportation and that the order of deportation entered by the Special Inquiry Officer should be approved. We will, therefore, dismiss the appeal.''

[9] Reported at 113 Fed. Supp. 22.

[10] The appellant was given a general sentence of one year and one day imprisonment. He contends that since he was given a general sentence there was but one conviction, although the indictment related to two distinct transactions, therefore, the finding of the special inquiry officer that he was deportable on two grounds was unwarranted and prejudicial to him. He further submits that there is no valid law

tended that the district court erred in discharging the writ of habeas corpus on the ground that section 242(b), *supra*, is violative of the Fifth Amendment to the Constitution of the United States in that it fails to meet the currently accepted standards for a fair and impartial hearing because: (1) investigative and prosecutive functions of the special inquiry officer are commingled with his adjudicative functions and (2) such officer is amenable to the supervision of the Attorney General whose responsibility it is to enforce the deportation statutes. He argues that sections 241(a)(11) and 241(d) of the Act, which authorize deportation for offenses committed prior to the effective date of the Act, are unconstitutional as *ex post facto* laws in that they imposed an additional punishment for an act greater than the law annexed to the crime when it was committed. Finally, he contends that he was entitled to a hearing on his application for discretionary relief which was denied him.

As we understand appellant's argument, he urges that the proceedings prescribed by section 242(b) are subject to, but not in conformity with, the Administrative Procedure Act,[11] or, if not subject to the requirements of that Act, then section 242(b) is violative of the Due Process Clause of the Fifth Amendment, since the Administrative Procedure Act establishes the "currently accepted standards of fairness and impartiality" necessary to constitute due process of law in administrative hearings. Clearly the procedure prescribed by section 242(b) does not accord with section 5(c)[12] [fol. 38] of the Administrative Procedure Act, and we shall consider first the contention that in all respects the requirements of the Administrative Procedure Act are controlling.

It is not necessary for decision in this case to consider the

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of the United States relating to "the illicit traffic in narcotic drugs", thus he could not have been, and was not, convicted of such an offense. Inasmuch as he was convicted of the "violation of [a] law or regulation governing or controlling the taxing", et cetera, of marihuana, which is a deportable offense under the statute, as charged in the warrant, admitted at the hearing and found by the hearing officer, we deem it unnecessary to this opinion to resolve these issues.

[11] 5 U. S. C. A. 1001, et seq.

[12] 5 U. S. C. A. 1004(c).

broad proposition of whether deportation proceedings are subject to requirements of the Administrative Procedure Act [13] as concerns matters not expressly provided by the Immigration Statute. Our investigation is limited to a determination of whether the proceedings provided for by section 242(b), which were followed in this case, are invalid because contrary to that Act. Prior to the enactment of the Immigration and Nationality Act of 1952, there was no express provision in the immigration law requiring that a hearing be granted a deportee. Such matters were left largely to be administered under regulations promulgated by the Attorney General. However, under the decisions of the Supreme Court,[14] the requirement for a fair hearing was necessarily implicit in the deportation statutes and such hearing was required to conform to the Administrative Procedure Act. Following the decision of the Supreme Court in the Sung case, Congress, by a rider to the supplemental appropriations bill enacted in September, 1950,[15] exempted "Proceedings under law relating to the exclusion or expulsion of aliens" from the provisions of sections 5, 7 and 8 of the Administrative Procedure Act. This rider was [fol. 39] repealed by the Immigration and Nationality Act of 1952, which specifically prescribed the procedure to be followed in deportation cases in section 242(b) thereof with a further provision that:

> "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

Appellant relies upon the decision in the Sung case to support his contention that deportation proceedings are amenable to the requirements of the Administrative Procedure Act. However, at the time Sung was ordered deported Congress had prescribed no procedure to govern

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[13] See Sung v. McGrath, 339 U. S. 33; Rubinstein v. Brownell, D. C. Cir., 206 F. 2d 449, affirmed by an equally divided court, 346 U. S. 929.

[14] Notably The Japanese Immigrant case, 189 U. S. 86, 101, and Sung v. McGrath, supra.

[15] 64 Stat. 1048.

deportation proceedings. In the absence of such legislation the Supreme Court held that the hearing to which Sung was entitled under its prior decisions must conform to the Administrative Procedure Act. Since that time Congress has provided a "sole and exclusive" procedure for determining the deportability of an alien, and therefore, the Sung case is no longer applicable. The case of *Rubinstein v. Brownell*, footnote 13, *supra*, has no application here. It holds merely that a deportation order issued pursuant to the Immigration and Nationality Act of 1952 is subject to judicial review under section 10 of the Administrative Procedure Act.

In view of the plain language of the Immigration Statute, it is difficult to follow appellant's argument that the Administrative Procedure Act has the effect of nullifying the subsequent Act of Congress. He admits that section 242(b) [fol. 40] reveals "an unmistakable attempt by Congress to exempt immigration proceedings" from the Administrative Procedure Act, but contends that it has failed to do so. The force of appellant's argument is that by some means the Administrative Procedure Act has the standing of a Constitutional Amendment and Congress is powerless to provide for administrative hearings which do not conform to it. Of course, there is no validity to such an argument.

Section 7(a) of the Administrative Procedure Act, 5 U. S. C. A. 1006 (a), exempts from the purview of that Act "specified classes of proceedings . . . . . specially provided for by or designated pursuant to statute." We are persuaded that this exemption is applicable to hearings held under section 242(b). Furthermore, and controlling here, even in the absence of such provision, it was within the power of Congress to exempt such proceedings as those under review from the requirements of its creature, the Administrative Procedure Act. It is fundamental that a prior statute must yield to a subsequent valid act of Congress, insofar as the statutes are repugnant. We hold, therefore, that to the extent the proceedings prescribed by section 242(b) are inconsistent with the Administrative Procedure Act, the requirements of the latter Act are inapplicable to the deportation proceedings.

It is beyond question that an alien has no absolute right to remain in the United States. Congress has plenary

[fol. 41] power over aliens and may deport them from this country at any time for any reason, even on grounds not existent at the time of their entry. "Otherwise, when an alien once legally became a denizen of this country he could not be deported for any reason of which he had not been forewarned at the time of entry." *Carlson v. Landon*, 342 U. S. 524, 536. Permissible grounds of deportation of aliens is a matter, where not controlled by treaty, alone for Congressional determination, and controlled only by legislative considerations of international polity and comity. This power of deportation, as stated in a masterly discussion by Mr. Justice Jackson in delivering the opinion of the Court, is "a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state." *Harisiades v. Shaughnessy*, 342 U. S. 580, 587 and see note 14, p. 588. As to the grounds or causes for deportation, the courts are not empowered to substitute their opinion for that of Congress and can properly determine only whether the existence of any prescribed ground of deportation has been fairly established. Thus an alien is not without rights for the due process clause of the Fifth Amendment is available protection for alien and citizen alike. A resident alien, subject to expulsion and deportation under conditions which Congress may prescribe, may not be deprived of his constitutional right to procedural due process. *Chew v. Colding*, 344 U. S. 590. This includes the right to a fair hearing "before a tribunal which meets at least currently prevailing standards of impartiality." *Sung v. McGrath, supra.* Appellant insists, however, that the procedure provided for in [fol. 42] section 242(b) falls short of the current conception of fairness and impartiality and in operation constitutes a deprivation of procedural due process for the reasons above indicated.

With respect to the contention that deportation proceedings must be measured by and equated to the Administrative Procedure Act we think it sufficient to say that we agree with the district court that the Administrative Procedure Act is not the sole criterion of due process of law. In reference to that Act, the Supreme Court, in *United States v. Morton Salt Company*, 338 U. S. 632, 644, observed that "It created safeguards even narrower than the constitutional ones,

against arbitrary official encroachment on private rights. While that case is not directly in point, we think that the observation is applicable here.

The reference which we have made to the "prosecutive functions of the special inquiry officer" relate to his duties which partake of the nature of prosecution. Under the terms of the statute it is his duty to conduct the proceedings, administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, when authorized by the Attorney General, to make determinations [fol. 43] tions, including orders of deportations. The special inquiry officer is authorized to conduct a proceeding in any case in which he has participated in investigative functions or except to the extent stated above, in prosecuting functions. Thus, a special inquiry officer is prohibited from sitting as arbitor in a case which he was responsible for investigating and his prosecutive functions are restricted to those enumerated. Furthermore, as additional safeguards that the alien shall be accorded a fair hearing, determination of deportability in each case can rest only upon the record made before the special inquiry officer and shall not then be valid unless it is based upon reasonable, substantial and probative evidence. In addition to these safeguards the alien must be given notice of the nature of the charges against him and the time and place where the proceedings are to be held; a reasonable opportunity to be present and to be represented by counsel; an opportunity to examine the evidence against him, to present evidence in his own behalf

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[16] "The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this chapter to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this chapter, as the Attorney General shall prescribe." 8 U. S. C. A. sec. 1101 (b)(4).

and to cross-examine witnesses presented by the Government.

A hearing in a deportation proceeding is not unfair merely because the rules of evidence and procedure applicable to judicial hearings are not adhered to. To render such a hearing unfair the defects complained of must be such as to lead to a denial of justice. We find no such defect here.[7] Appellant does not deny that the requirements of the statute were complied with. He contends merely that under the prescribed procedure the administrative or executive officers are in a position to abuse their discretion or to be wrongfully influenced by matters outside the record. It is the deprivation of due process of law which is prohibited by the Fifth Amendment, not the opportunity to abuse due process. We are not at liberty to assume that the officers who are entrusted with the duty of administering the law will violate their trust or their statutory duty. In the event of such breach of duty, the alien will be fully protected by judicial process. See *Accardi v. Shaughnessy*, decided March 15, 1954, — U. S. —.

[fol. 44]

In his petition, appellant urged that on the day of his arrest the Attorney General announced in a public statement that "your petitioner was an undesirable citizen (sic) and had been guilty of many crimes, and that the proceedings were specially designed to deport petitioner" and that such publicity "was bound to have great effect upon the special inquiry officer." It was also alleged that "the petitioner is further informed and believes that the Attorney General sometime in 1952 prepared a list of 152 persons whom he desired to deport, and that your petitioner's name was included on this list." These allegations were made in support of appellant's claim that he was prejudiced by reason of the special inquiry officer being subject to the supervision of the Attorney General and was thereby de-

[7] United States ex rel Harisiades v. Shaughnessy, 187 F. 2d. 137, 141, and cases cited, affirmed 342 U. S. 580; Bilzarro v. Zimmerman, 3 Cir., 200 F. 2d. 282; Kleeman v. Crossman, 5 Cir., 103 F. 2d. 202; Hays v. Hatges, 8 Cir., 94 F. 2d. 67; Hays v. Zahariades, 8 Cir., 90 F. 2d. 3; Reynolds v. Dean, 7 Cir., 68 F. 2d. 346; Palmer v. Ultimo, 7 Cir., 69 F. 2d. 1.

prived of a fair hearing. Although given an opportunity to do so, appellant made no attempt to substantiate these [fol. 45] allegations. There is no evidence in the record that the Attorney General prepared a list of aliens whom he desired to deport or, of course, that appellant's name was among those listed. Likewise, the record is silent as to the alleged statement made by the Attorney General, except for six newspaper clippings which were exhibits at the deportation hearing in some of which the statement attributed to the Attorney General was reported. These clippings evidence only that there was unfavorable publicity concerning appellant's arrest and do not constitute evidence of the facts stated therein. Nevertheless, assuming that the Attorney General did make such a statement, in this case it could hardly be said to have prejudiced appellant or to have influenced the special inquiry officer's determination of deportability. This is not a case where closely contested factual issues were presented for determination. Appellant admitted that in 1938 he was convicted of violating the Marihuana Tax Act of 1937, therefore, his deportability under section 241(a)(11) was established as a matter of law.

The contention that the provisions of section 241 [18] are unconstitutional, null and void because they are *ex post facto* laws, violative of the provisions of Article 1, Section 9, Clause 3 of the Constitution of the United States, requires [fol. 46] little discussion. It is too well established to admit of controversy that acts of Congress governing deportation

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[18] Section 241(a)(11), 8 U. S. C. A. 1251(a)(11), provides that any alien who "is, or hereafter at any time after entry has been . . . . . convicted," et cetera, shall be deported upon order of the Attorney General. Section 241(d), 8 U. S. C. A. 1251(d), provides that with exceptions not pertinent here the provisions of the statute are applicable to all aliens belonging to any of classes enumerated in subsection (a) notwithstanding "(1) that such alien entered the United States prior to June 27, 1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to June 27, 1952."

are not subject to the constitutional prohibition against the passage of *ex post facto* laws.[19] Appellant suggests that the Supreme Court, given another opportunity to review its prior decisions, might reach a different result. However, those decisions are binding upon us and, even if — were disposed to do so, which we are not, we have no power to overrule them.

This leaves for consideration appellant's contention that he was arbitrarily denied a hearing on his application for a suspension of deportation. The district court did not expressly rule on this issue, however, it is properly before us for decision. We have hereinbefore related the circumstances under which this application was belatedly filed, denied by the special inquiry officer and renewed before the Board of Immigration Appeals. Aside from the fact that the application was not timely filed, see *McKenzie v. Savoretti*, 5 Cir., 200 F. 2d. 546, by expressing his willingness to have the application considered by the Board without reopening the hearing, appellant waived his objections to the overruling of his motions to reopen the hearing. Furthermore, upon considering the application as having been made before it, the Board viewed it as though appellant could have proved all of the facts alleged therein and treated it [fol. 47] for all purposes as a valid application for discretionary relief.

Appellant, apparently recognizing that he is hard pressed to show that he was prejudiced by the ruling of the special inquiry officer in view of his waiver, urges that the reasons given by the Board for denying discretionary relief are unsound. It is noted that this point was not raised by the petition in the trial court and that it is not even alleged here that the Board abused its discretion or failed to exercise it. *Caddeo v. McGranery*, D. C. Cir., 202 F. 2d 807. The Board did not take "it upon themselves to decide that the appellant could not establish good character", as stated by appellant. Upon his express waiver of further hearing, the

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[19] Harisiades v. Shaughnessy, 342 U. S. 580, 594; United States ex rel Shaughnessy, 338 U. S. 521, 529; Mahler v. Eby, 264 U.S. 32; Bugajewitz v. Adams, 228 U. S. 585. See also Carlson v. Landon, 342 U. S. 524.

Board, considering the facts disclosed by the record, exercised its discretion and determined that the order of deportation should not be suspended.

It was not improper for the Board to consider appellant's prior convictions, his numerous arrests and his refusal to give testimony before a Senate Investigating Committee in the exercise of its discretion to deny his application. Although only three of his arrests resulted in convictions and, upon a holding that he was not criminally liable for refusing to testify before the Senate Committee, one of these was reversed [20] and he received a full pardon from another, the Board was not precluded from considering these factors in reaching its conclusion.

[fol. 48] It is urged by appellant that this court should consider the recent decision of the Supreme Court in *Accardi v. Shaughnessy, supra*, in arriving at a decision in this case. We find nothing in that opinion inconsistent with what we have held here. The court there held that when a measure of discretion is delegated to a subordinate officer or board, a petition alleging that such discretion was not exercised, or that the decision of such body was dictated by a higher authority, states a cause for relief and the petitioner is entitled to a hearing on that issue. In the present case appellant was given an opportunity to establish the allegations of his petition and made no effort to do so. In this situation he cannot be heard to complain.

The judgment of the district court is affirmed.

Judgment affirmed.

[20] Marcello v. United States, 5 Cir., 196 F. 2d 437.

[fol. 49] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

CARLOS MARCELLO

versus

EDWARD J. AHRENS, Officer in Charge, United States Immigration and Naturalization Service

JUDGMENT—May 6th, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 50] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

APPLICATION FOR REHEARING—Filed May 7th, 1954

Now into this Honorable Court comes Carlos Marcello, appellant, and petitions the Court to grant him a rehearing from the opinion and judgment rendered by this Court on May 6, 1954 upon the following grounds:

1. That said opinion and judgment are contrary to the law and the evidence in the cause.

2. That the Court erred in affirming the judgment of the United States District Court for the Eastern District of Louisiana discharging the writ of habeas corpus and sustaining the validity of the deportation order against appellant.

3. That the Court erred in holding that Section 242(b) Immigration and Nationality Act of 1952 did not vio-

late of the due process clause of the Fifth Amendment to the Constitution of the United States in that it fails to meet the currently accepted standards for a fair hearing in that:

a) Investigative and prosecutive functions of the special inquiry office are commingled with his adjudicative functions, and

b) such officer is amenable to the supervision of the Attorney General, whose responsibility is to enforce the deportation statutes.

[fol. 51] 4. That the Court erred in failing to hold Section 241(a) 11 of the Immigration and Nationality Act of 1952 was unconstitutional as an ex post facto law in violation of Article I, Section 9, Clause 3 of the Constitution of the United States.

5. That the Court erred in upholding the Board of Immigration Appeals' action in denying suspension of deportation.

6. That the Court erred in deciding that the case of Rubenstein v. Brownell, 206 F. (2d) 449, holding that the Administrative Procedure Act applied to deportation proceeding under the 1952 act, had no application here.

7. That the Court erred in deciding that the case of Accardi v. Shaughnessey, decided March 15, 1954, was not applicable to this cause, whereas in truth and in fact the newspaper clipping of the Attorney General's statement at the time of appellant's arrest and the failure of the government to deny the existence of a deportation list clearly shows such list existed and deprived appellant of the independent discretion and judgment of both the Special Inquiry Officer and the Board of Immigration Appeals in the determination of his deportation case.

This application is submitted in typewritten form because of the necessity for haste in applying for a stay of deportation.

Wherefore, appellant prays that because of the above listed errors he be granted a rehearing in this cause and that

upon the final determination of this cause, the writ of habeas corpus be maintained and appellant released from custody.

Respectfully submitted, (S.) Wm. C. Orchard, P. M. Flanagan, Counsel for Appellant.

[File endorsement omitted.]

[fol. 52] CERTIFICATE

I, undersigned counsel for Carlos Marcello, appellant, do hereby certify that the above application is filed in good faith and that a copy has been served upon the United States Attorney for the Eastern District of Louisiana.

William C. Orchard.

[File endorsement omitted.]

[fol. 53] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

PETITION FOR STAY OF DEPORTATION—Filed May 7, 1954.

Now comes Carlos Marcello, appellant herein, and petitions this Honorable Court for an order commanding the Immigration and Naturalization Service, acting through respondent, his successors, agents, and/or employees, to stay deportation proceedings against appellant and to keep and retain appellant within the jurisdiction of this Court and within the New Orleans Division of the Eastern District of Louisiana pending final action by this Honorable Court on appellant's application for a rehearing in this Court upon the following grounds:

1. That this Honorable Court on May 6, 1954, affirmed a judgment of the United States District Court for the Eastern District of Louisiana discharging a writ of

habeas corpus and sustaining the validity of a deportation order against appellant.

2. That an application for a rehearing has been filed by appellant in this Court in accordance with law and the rules of this Court.

3. That under the rules of this Honorable Court, the judgment of this Court does not become final until twenty-one days after the rendition of such judgment if the appellant does not file a petition for a rehearing and in the event a petition for rehearing is filed, then the judgment does not become final until ten days after the denial of the application for a rehearing.

[fol. 54] 4. That the order of the United States District Court for the Eastern District of Louisiana, dated June 8, 1953, authorizes the release of appellant on bail pending appeal and the bond executed by appellant provides for his release pending final judgment of this Honorable Court.

5. That Rule 45(4) of the Supreme Court of the United States provides that in habeas corpus cases the initial order respecting enlargement of the appellant pending appeal as well as any recognizance taken thereunder, shall be deemed to cover not only the review by this Honorable Court but also possible review in the Supreme Court.

6. That notwithstanding the orders and rules of Courts as above recited and the law and jurisprudence relating thereto, appellant is informed and being so informed alleges and believes that it is the intention and plan of the respondent, his successors, agents and employees of the United States Immigration and Naturalization Service of the United States and of the said Service itself to remove appellant from this jurisdiction and the Eastern District of Louisiana where he is now at liberty and to deport him from the United States of America upon the rendition of an opinion by this Court affirming the order or judgment by the United States District Court for the Eastern District of Louisiana discharging the writ of habeas corpus and without allowing this Court to pass upon appellant's application for a rehearing.

7. That appellant has raised in these proceedings serious and substantial questions of law which should be finally decided by this Court and the Supreme Court of the United States upon appellant complying with and exercising all the remedies and procedures granted [fol. 55] to him as provided by law and the rules of said Courts.

8. That, therefore, appellant prays that deportation proceedings against him be stayed pending final determination of his application for a rehearing in this Court, and that he be kept and retained within the jurisdiction of this Court pending such action upon his application for a rehearing in this cause. And for all necessary orders in the premises.

Wm. C. Orchard, P. M. Flanagan, Counsel for Appellant.

[File endorsement omitted.]

CERTIFICATE

The undersigned attorney for appellant hereby certifies that he served a copy of the above application for a stay by handing same to the United States Attorney for the Eastern District of Louisiana.

William C. Orchard.

[File endorsement omitted.]

[fol. 56] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

ORDER DENYING PETITION OF APPELLANT FOR STAY OF DEPORTATION—May 14, 1954.

The foregoing petition considered.

It is denied without prejudice, since the undersigned is unwilling to assume, based only on an allegation of informa-

tion and belief, and without the source of the information being given, that the Immigration and Naturalization Service, Department of Justice, acting through respondent or his associates or otherwise, would proceed to deport the applicant during the pendency of the motion for rehearing in this case. If such attempt should be made the petitioner will be at liberty to at once renew his motions before any judge of this Court.

This May 11th, 1954.

(S.) Robert L. Russell, United States Circuit Judge.

[fol. 57] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

STIPULATION FOR SUBSTITUTION OF JOHN M. BONDS, OFFICER IN CHARGE—May 14th, 1954

It is jointly agreed and stipulated by and between Appellant and Appellee, through their undersigned attorneys of record, that Edward J. Ahrens, Officer in Charge, Immigration and Naturalization Service, at New Orleans, Louisiana, Appellee, has been succeeded in that office by John M. Bonds, Officer in Charge, and that the said John M. Bonds, Officer in Charge, be substituted and made Appellee of record herein, in accordance with the provisions of Rule 25 (d), Federal Rules of Civil Procedure.

William C. Orchard, Counsel for Appellant; George R. Blue, United States Attorney, New Orleans, Louisiana; M. Hepburn Many, Asst. United States Attorney, New Orleans, Louisiana; Douglas P. Lillis, Acting District Counsel, Immigration and Naturalization Service, Miami, Florida, Counsel for Appellee.

[fol. 58] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

ORDER GRANTING THE STIPULATION FOR SUBSTITUTION—Filed May 19th, 1954

Considering the above stipulation,

It is ordered that John M. Bonds, Officer in Charge, Immigration and Naturalization Service, be and he is hereby substituted and made Appellee of record herein, in place and stead of Edward J. Ahrens, Officer in Charge, in accordance with the provisions of Rule 25(d), Federal Rules of Civil Procedure.

(S.) J. C. Hutcheson, Jr., Circuit Judge.

[fol. 59] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—May 25th, 1954

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 60] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

PETITION FOR STAY OF MANDATE AND EXECUTION OF JUDGMENT AND ORDER OF DEPORTATION—May 28th, 1954

Appellant shows to the Court as follows:

1. That on May 6, 1954, this Court rendered its opinion affirming the judgment of the United States District Court for the Eastern District of Louisiana and on May 25, 1954 denied appellant's petition for a rehearing.

2. That Appellant desires to file an application to the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court.

3. Appellant requests a stay of the issuance of the mandate herein and a stay of the execution of the judgment and order of deportation for a period of thirty days within which to make such application to the Supreme Court of the United States for a writ of certiorari.

4. Appellant further requests that upon the filing of the certificate of the Clerk of the Supreme Court of the United States that an application for a writ of certiorari has been filed within thirty days that the mandate and execution of the Judgment and order of deportation be stayed until the final disposition of this case by the Supreme Court of the United States.

[fol. 61] Wherefore, Appellant petitions this Court for an order granting such stays as requested herein.

(S.) Wm. C. Orchard, Counsel for Appellant.

[fol. 62] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

ORDER STAYING MANDATE AND DEPORTATION PENDING APPLICATION TO SUPREME COURT FOR CERTIORARI—Filed May 28th, 1954

On consideration of the application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, and for a stay of the deportation order against Appellant, to enable the Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this Court in said cause and the deportation order against the Appellant be and the same are hereby stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 27th day of May, 1954.

(S.) Robert L. Russell, United States Circuit Judge.

[fol. 63] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 54] BEFORE THE U. S. DEPARTMENT OF JUSTICE, BOARD OF IMMIGRATION APPEALS

DECISION—JUNE 1, 1953

File: A-2669541—Miami

In re: Carlos Marcello or Calogero Minacari

In Deportation Proceedings

In Behalf of Respondent: William C. Orchard, Esquire 204 Queen and Crescent Building, New Orleans, Louisiana and Jack Wasserman, Esquire Warner Building, Washington, D. C. (Heard May 11, 1953)

In Behalf of Service: Sidney B. Rawitz and Hyman Scher, Service Representatives (Heard May 11, 1953)

Charges: Warrant: Act of 1952—Convicted of Violation of law relating to illicit traffic in narcotic drugs—Section 241(a)(11); Act of 1952—Convicted of violation of law governing taxing, etc., of marihuana—Section 241(a)(11)

Lodged: None

Application: Termination of proceedings or reopening of hearing

Detention Status: Released under bond

This case is before us on appeal from a decision of a Special Inquiry Officer dated February 20, 1953, directing the respondent's deportation.

The respondent is a 43-year-old male, native of Tunisia and apparently of Italian nationality, who has resided in the United States since October 7, 1910. He last entered during 1936 or 1937 after a visit of a few hours in Mexico. On October 29, 1938, he was sentenced to imprisonment for a term of one year and one day following his conviction on a plea of guilty to an indictment containing two counts. [fol. 55] The first count charged that on or about December 6, 1937, he feloniously transferred to another individual a quantity of marihuana, which transfer was not made pursuant to a written order on the required form, in violation of the Act of August 2, 1937 (26 U. S. C. 2591). Count two charged a similar unlawful transfer of marihuana on or about December 15, 1937.

By brief and at the oral argument, counsel raised a number of contentions. They assert that the hearing was unfair because of adverse newspaper publicity resulting from

a press release of former Attorney General McGranery at the time the immigration warrant of arrest was served and because members of the press were permitted to be present during the hearing before the Special Inquiry Officer. Counsel do not argue that there is any prohibition in the statute or in the regulations, against deportation hearings being open to the public, and we do not believe that either of the factors mentioned resulted in the preclusion of a fair hearing to the respondent. This is particularly so with respect to the issue of deportability in this case since there is no dispute as to the facts.

Another contention of counsel is that the hearing was void because of asserted failure to comply with the Administrative Procedure Act. They rely on Section 403(a)(47) of the Immigration and Nationality Act which repealed the provision of law exempting the Immigration and Naturalization Service from compliance with Sections 5, 7 and 8 of the Administrative Procedure Act. We have carefully considered the argument which was advanced and the excerpts from the speeches of Senator McCarran and Congressman Walter to which counsel referred. We believe that the following statement appearing in the Conference Report [1] is illuminating:

> Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings.

We think that the foregoing makes it abundantly clear that it was not intended that deportation proceedings should be subject to the specific provisions of the Administrative Procedure Act, but rather that the procedural requirements, laid down in Section 242(b) of the Immigration and Na-

[1] U.S. Code Congressional and Administrative News, 82nd Congress, Second Session, Vol. 2, p. 1754.

tionality Act, were considered by Congress to be within the pattern of the Administrative Procedure Act and to meet the standards of that Act. We doubt that Congress could have expressed this more clearly than it did by the [fol. 56] use of the following language in Section 242(b): "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this Section." We hold that the procedure which was followed in the respondent's case was entirely in accord with that specified in Section 242(b) of the Immigration and Nationality Act and regulations made pursuant thereto, and that counsel's contention relating to the Administrative Procedure Act must be rejected.

Counsel also contend that the proceeding violates the due process and ex post facto provisions of the Constitution. It is true that the respondent committed the narcotic offense in December 1937 and that, when the word "marihuana" was added to the Act of February 18, 1931 by Section 21 of the Alien Registration Act of 1940, specific provision was made that no alien should be deportable by reason of such amendment for an act committed prior thereto. However, we consider the situation as being no different from that existing in *Mahler* v. *Eby*, 264 U.S. 32 (1924). In that case, the aliens were convicted in 1918 and their deportation was sought under the Act of May 10, 1920. It was there contended that the Act of May 10, 1920 was an ex post facto law, because the offense had been committed prior to its enactment, and that the proceedings were without due process of law. These contentions were rejected, the Court stating that the inhibition against the passage of an ex post facto law applied only to criminal laws. The same contentions were again rejected in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952). Hence, we find this contention of counsel to be without merit.

It is also argued by the respondent's counsel that Section 241(a)(11) of the Immigration and Nationality Act, under which the Service contends the respondent is deportable, cannot be given a retroactive application. We agree that the savings clause contained in Section 405(a) of the Immigration and Nationality Act is very broad. Yet counsel has not cited any specific language in that Section on which

they desire to place reliance. Our examination of Section 66(a) does not disclose any specific provision particularly applicable to the respondent's case, and we believe that the phrase therein reading, "unless otherwise specifically provided," defeats his claim because Section 241(d) does, in fact, specifically provide as follows:

> Except as otherwise specifically provided in this Section, the provisions of this Section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), not withstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

For the proposition that Section 241(a)(11) cannot be given a retroactive application, counsel also argue that this paragraph distinguishes between narcotics offenses and marihuana offenses; that both charges cannot be sus- [fol. 57] tained; that, if any charge can be sustained, it is the marihuana charge; and that there is no specific provision in the clause dealing with marihuana which would make it retroactive. We have been unable to find, in counsel's briefs or oral argument, any elaboration of their view that both charges cannot be sustained. We find no repugnance in these two charges. Section 241(a)(11) authorizes the deportation of an alien " * * * who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing * * * of * * * marihuana, * * * ."

The only difference in the two clauses quoted above, insofar as the question of whether they are retroactive is concerned, is that in the first clause appears the words "at any time" and these words do not appear in the second clause. Since the clause relating to narcotic drug addicts, which precedes the clauses quoted above, is prospective in operation, it is possible that the words "at any time" were inserted in the next clause to emphasize that it was retrospective, and that it was not considered necessary to again

use this phrase in the last clause. The respondent's one conviction is within the purview of both clauses quoted above, that is, *he has been convicted* of a violation of a law relating to the illicit traffic in narcotic drugs and *he has been convicted* of a violation of a law controlling the taxing of marihuana. In view of the foregoing, we conclude that the respondent is deportable on the two charges contained in the warrant of arrest.

Counsel also contend that, before a valid order of deportation can be entered, it is necessary that the place of deportation be designated. We must reject this contention on the basis of our decision in *Matter of R.*, Int. Dec. 411, decided December 4, 1952, approved by Attorney General December 29, 1952.

The remaining question relates to the respondent's motion to reopen the proceeding to permit the filing of an application for suspension of deportation, which motion was denied by the Special Inquiry Officer. At the oral argument, the Service Representative contended that, because of the respondent's incarceration in a federal penitentiary from November 1938 to August 1939, he cannot meet the requirements of Section 244(a)(5) of the Immigration and Nationality Act.[2]

[fol. 58] The pertinent portion of Section 244(a)(5) is as follows:

> Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation * * * in the case of an alien who — * * * (5) is deportable under paragraph * * * (11) * * * of section 241(a) for an act committed or status acquired subsequent to such entry into the United

[2] It might be argued that the words "assumption of a status" in Section 244(a)(5) should be construed, in the respondent's case, to mean the date when he assumed the status of a deportable alien, that is, on December 24, 1952 when the Immigration and Nationality Act became effective, and that he cannot prove physical presence and good moral character for ten years thereafter. The Service has not urged this interpretation, and we deem it unnecessary to discuss such an obviously strained construction.

States * * *; has been physically present in the United States for a continuous period of *not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation*, and proves that during all of such period he has been and is a person of good moral character; * * *. (Italics supplied.)

The Service, relying primarily on the word "immediately", contends that the underscored portion means that an applicant for suspension of deportation under paragraph (5) must establish physical presence and good moral character during a period of ten years *immediately* following the commission of an act or the assumption of a status constituting a ground for deportation. Applying this contention to the respondent's case, it is claimed that, by the use of the word "immediately", the 10-year period during which the requirements mentioned must be established commenced on December 6 or 15, 1937 (the dates when the offenses were committed) if we depend on the words "commission of an act", or on October 29, 1938 (the date of conviction) if we rely on the phrase "assumption of a status". Since it was not the commission of the offense, but the conviction, which constitutes a ground for deportation, we may disregard the dates December 6 or 15, 1937. The Service is contending that the respondent must establish good moral character from October 1938 to October 1948 and that, since he was in prison from November 1938 to August 1939, he is precluded from meeting this requirement because of the provision contained in Section 101(f)(7) which is to the effect that no person shall be regarded as of good moral character if he has been confined to a penal institution for 180 days or more during the period for which good moral character is required.

Taking into consideration the phrase in Section 244(a)(5) reading, "during all of such period he has been and is a person of good moral character", we find that, if we were to adopt the construction urged by the Service, it would be tantamount to saying that the respondent must establish that he is now a person of good moral character and that he was a person of good moral character from 1938 to

1948 but that it is immaterial whether he was physically present in the United States or of good moral character from 1949 to 1952. In the case of an alien who became deportable in 1925, it would mean that he would have to prove physical presence and good moral character from 1925 to 1935 and that he need not prove such requirements [fol. 59] from 1935 to 1952. Since there is an obvious ambiguity concerning the period during which such an applicant must establish physical presence and good moral character, we must construe the statute to give effect to the intention of Congress.

It is well settled that a case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning[3] and that a statute should be construed so as to carry out the intent of the legislature, although such construction may seem contrary to the letter of the statute.[4] In addition, Section 244(a)(5) was specifically made applicable to persons deportable on criminal grounds by the inclusion of paragraph (4) of Section 241 (a), which paragraph relates solely to aliens convicted of crimes involving moral turpitude. Hence, Congress must have intended that reformed criminals should be in a position to apply for suspension of deportation. Yet, since almost all aliens of this class would probably be confined for over 180 days after becoming deportable, the effect of adopting the construction urged by the Service would be to virtually eliminate the possibility that a reformed criminal could ever apply for suspension under paragraph (5), regardless of whether twenty or thirty years had elapsed since he was released from prison and regardless of his complete rehabilitation since that time. Other rules of statutory construction, which are pertinent to our consideration, are that a law will not be strictly read if such reading would result "in the emasculation or deletion of a provision which a less literal reading would preserve"[5] and

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[3] *Stewart* v. *Kahn*, 78 U.S. 493, 504 (1870)

[4] *Wilkinson* v. *Leland*, 27 U.S. 627, 662 (1829); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892); *Ozawa* v. *United States*, 260 U.S. 178, 194 (1922)

[5] *Markham et al.* v. *Cabell*, 326 U. S. 404, 409 (1945)

that a remedial statute should be construed liberally to carry out the purposes of its enactment.[6]

In determining the construction which should be placed on the statutory provision under consideration, we note that paragraph (1) of Section 244(a) requires physical presence and good moral character for "not less than seven years *immediately* preceding the date of such application"; paragraph (2), "not less than five years *immediately* preceding his application"; paragraph (3), "not less than five years *immediately* following the commission of an act, or the assumption of a status, constituting a ground for deportation"; and paragraph (4), "not less than ten years after such entry and *immediately* preceding his application". In each of these paragraphs, as well as in paragraph (5), the word "immediately" was used in denoting the pe- [fol. 60] riod during which physical presence and good moral character were to be proved. In paragraphs (1), (2) and (4), where the period is that preceding the application, the word "immediately" was appropriate and necessary to prevent any claim that proof of physical presence and good moral character during some earlier period would be a compliance with the statute. It is readily understandable that the framers of the legislation, having found it incumbent to employ the word "immediately" in three paragraphs, may have inadvertently inserted it in paragraphs (3) and (5) without recognizing that it might result in a construction contrary to the intended scope of this provision.

We have also observed that in both paragraphs (3) and (5), which are the two paragraphs relating to deportability on grounds arising subsequent to entry, the language used was identical with the exception that paragraph (3) specifies five years rather than ten years. In commenting on paragraphs (3) and (5), the following appears in House Report number 1365:[7]

> The third category * * * provides for the adjustment of status * * * upon a showing of 5 years' con-

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[6] *Stewart* v. *Kahn*, 78 U.S. 493, 504 (1870)

[7] U. S. Code Congressional and Administrative News, 82nd Congress, Second Session, Vol. 2, pp. 1717-1718

tinuous physical presence *immediately* following the commission of an act or the assumption of a status constituting a ground for deportation, good moral character during that period * * *.

The fifth category * * * provides for the adjustment of status * * * upon a showing of 10 years' continuous physical presence after the commission of an act, or the assumption of a status constituting a ground for deportation, good moral character during that period * * *.

The language quoted above is found in identical form at page 25 in Senate Report number 1137 relating to S. 2550. That Congress did not attach any particular significance to the word "immediately" in paragraphs (3) and (5) is shown by the fact that in both the Senate and House Reports the word "immediately" was used in the comment on paragraph (3), and in both reports it was omitted with reference to paragraph (5), the specific provision with which we are here concerned.

While it might be argued that Congress was endeavoring to place certain added restrictions on the granting of suspension to persons of the criminal class, we do not think such an argument would be tenable. This would ignore the fact that precisely the same language is used in paragraph (3) which, by its terms, does not apply to persons of [fol. 61] the criminal class. Furthermore, if we were to adopt the construction urged by the Service, we would have to apply the same rule under paragraph (3) which would mean that such an alien would be forever precluded from applying for suspension if, during the first five years after becoming deportable, he committed some act which militated against the establishment of good moral character, but that he would not be barred if the same act or a more serious offense were committed after the expiration of five years.

In analyzing the provisions of paragraphs (2) to (5) inclusive of Section 244(a), we find that paragraphs (2) and (4) require a specified period of physical presence and good moral character immediately preceding the application, and that paragraphs (3) and (5) require such a period follow-

ing the date that an alien became deportable. Paragraphs (2) and (4) relate to aliens excludable at the time of entry and such an alien would, therefore, be subject to deportation immediately following entry. Hence, the requirement in paragraph (2) of five years' physical presence after the last entry would also constitute a requirement that five years must have elapsed after the date the alien became deportable. The same situation exists with respect to paragraph (4) in which there is a specific statement relating to "ten years *after such entry*". It is clear from the language of paragraphs (3) and (5) that a period of five or ten years must elapse after the date the alien became deportable. However, this requirement could not have been incorporated in paragraphs (3) and (5) merely by requiring proof of physical presence and good moral character for either five or ten years prior to the application, for in that case a person who had been physically present in the United States for five or ten years and who then became deportable could immediately apply for suspension of deportation, assuming that he was also able to establish good moral character.

After carefully reviewing the legislative history and Section 244(a) in its entirety, we believe that in paragraphs (2) to (5) Congress was concerned with two requirements: (a) that physical presence and good moral character must be proved for five or ten years preceding the application and (b) that five or ten years must elapse after the alien became deportable and before he might apply for suspension. It is our considered opinion, therefore, that paragraph (5) must be construed as requiring that, before an application for suspension may be submitted, at least ten years must have elapsed after the grounds for deportation arose, and that during the ten years immediately preceding the application, the alien must prove continuous physical presence in the United States and good moral character. In view of the foregoing, we conclude that the respondent is not barred from applying for suspension of deportation merely because he was confined in a penal institution during the period from November 1938 to August 1939.

As previously indicated, the respondent's motion to reopen the proceedings in order to permit the filing of an ap-

plication for suspension of deportation was denied by the Special Inquiry Officer. The latter's order indicates that he took this action because he had informed counsel at the hearing that applications for suspension of deportation or voluntary departure might be submitted and counsel declined to apply for either of these forms of relief. (pp. 24, [fol. 62] 25). Because of the failure to make timely application for suspension of deportation, the record is not as complete as might be desirable. At the oral argument (p. 5), the respondent's counsel stated that he believed that the hearing should be reopened unless the Service was prepared to permit the application for suspension to be considered by us notwithstanding the fact that no formal application had been made at the hearing. Under the circumstances, we will proceed to a consideration of whether suspension of deportation should be granted in this case.

Counsel is aware that 8 CFR 244.3 permits the consideration of confidential information, under certain circumstances, in connection with the question of whether voluntary departure or suspension of deportation should be granted. However, in the respondent's case, we have no knowledge as to whether the Service has a confidential file and we will consider only the record, consisting of the hearing and exhibits, in reaching a decision.

In the motion to reopen, it was asserted that the respondent first entered the United States at the age of 10 months; that he has been a person of good moral character during the last ten years; and that his deportation would result in exceptional and extremely unusual hardship to the alien, his citizen wife and four minor citizen children. At the hearing, the respondent testified that he is in the real estate business and the coin operated music box business. Counsel did not set forth, in his motion, any facts which would indicate that the respondent's deportation would, in fact, result in exceptional and extremely unusual hardship to the alien or to his wife or his children. We must take cognizance of the fact that both committees, in their reports to Congress on their respective bills (S. 2550 and H. R. 5678), stressed the restrictive purpose of the phrase "exceptional and extremely unusual hardship". The following appears at p. 25 in Senate Report number 1137 on S. 2550, 82nd Congress, 2nd Session, and, with the exception of the last

three sentences, is contained in almost identical form in the House Report:[8]

> The term "exceptional and extremely unusual hardship" requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as nonimmigrants but with the intention of establishing themselves in a situation [fol. 63] in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. This practice is grossly unfair to aliens who await their turn on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation, the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. To continue in the pattern existing under the present law is to make a mockery of our immigration system.

While we doubt that the alien could establish that his is an "exceptional and extremely unusual hardship" case and while there may well be some question whether he

[8] House Report number 1365 in U. S. Code Congressional and Administrative News, 2nd Congress, Second Session, Vol. 2, p. 1718

could establish good moral character, we will assume, for the purpose of this decision, that he would be able to establish all the requirements specified in Section 244(a)(5) of the Immigration and Nationality Act." As against any evidence he might present, there are the record of his conviction in 1938 for two transfers of bulk marihuana, totaling 380 ounces (Ex. 4); a Federal Bureau of Investigation Report (Ex. 5) which shows that he was arrested on several occasions, that most of the charges were dismissed but that in 1930 he was sentenced to nine to fourteen years for assault and robbery for which offenses he was paroled on July 25, 1935; clippings from newspapers published in New Orleans, Louisiana (Ex. 7) which the respondent's own counsel submitted and which refer to the respondent as a racketeer, "number one mobster in Louisiana," etc.; and his refusal to testify before the Kefauver Committee.

With respect to the latter matter, the respondent was found guilty in the District Court for the Eastern District of Louisiana on six counts of an indictment charging contempt of the United States Senate for refusing to answer certain questions before a Senate subcommittee. He had refused to answer 166 questions on the ground that the answers would tend to incriminate him, but at the trial he was found not guilty on all but six counts relating to six questions. On appeal, his conviction was reversed and a judgment of acquittal was rendered[*]. In *Mahler* v. *Eby*, *supra*, at p. 42, the Supreme Court, in discussing the ques-[fol. 64] tion of what evidence would warrant the finding that an alien was an undesirable resident, clearly indicated that the refusal of an alien to answer questions was an attitude from which it might well be inferred that what would be revealed by the answers would not add to the alien's desirability as a resident. Similarly, we believe that in the respondent's case, although he was acquitted by the appellate court, his refusal to answer questions on the ground that the answers might incriminate him does not indicate that he is a desirable resident. Section 244(a) specifically provides that "the Attorney General *may, in his discretion*, suspend deportation * * *". It is our considered opinion that the respondent's case is not one which merits the dis-

[*] Marcello v. United States, 196 F. 2d 437, CA 5 (1952)

cretionary relief of suspension of deportation and that the order of deportation entered by the Special Inquiry Officer should be approved. We will, therefore, dismiss the appeal."

Order: It is ordered that the appeal be and the same is hereby dismissed.

Thos. S. Finucane, Chairman.

[fol. 65] Respondent's Exhibit No. 3

Before the Board of Immigration Appeals

The Times-Picayune, December 31, 1952.

"U. S. Acts to End Marcello Stay."

Atty. Gen. James P. McGranery announced Marcello's arrest from his Washington office. He described Marcello as a large-scale slot machine operator in the state.

The arrest was the first major deportation move undertaken since the new immigration and nationality act became effective Dec. 24.

McGranery said the deportation action was another step in his program for ridding the country of "undesirable persons of foreign birth who are engaged in racketeering or other criminal activities."

[fol. 66] Before the Board of Immigration Appeals

Opinion and Order of Special Inquiry Officer

United States Department of Justice

Immigration and Naturalization Service

File: A2 662 541, New Orleans, February 20, 1953.

In re: Carlos Marcello, or, Calogero Minacari.

In Deportation Proceedings.

In Behalf of Respondent: William C. Orchard, Attorney, 204 Queen and Crescent Building, New Orleans.

Charges:

Warrant: Immigration and Nationality Act of 1952 — Convicted of the violation of a law relating to the illicit

traffic in narcotic drugs; Immigration and Nationality Act of 1952—Convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana.

[fol. 67] Lodged: None.

Application: None.

Detention Status: Released under $5,000 bond.

Warrant of Arrest Served: December 30, 1952.

Discussion: This record relates to a 43-year-old married male, born in Tunis, Africa, of Italian parents. While his testimony indicates doubt as to his citizenship, he testified that his mother and father were both born in Italy and that his father was naturalized in the United States about 1942. He appears to have acquired Italian citizenship at the time of birth by virtue of birth to Italian parents. This is substantiated by the fact that he was classified as a citizen of Italy at the time of his original entry into the United States. He originally entered the United States at New Orleans, Louisiana, October 7, 1940, when he was admitted as an immigrant alien. This entry has been verified, (Ex. 3). He last entered at Laredo, Texas, during 1936 or 1937 after a visit to Mexico of one to two hours. He testified that this trip to Mexico is the only time that he has been out of the United States since his original entry in 1940.

Counsel for the Respondent has made numerous objections and has excepted to the rulings of the Special Inquiry Officer. These objections will be discussed at this time before proceeding with the discussion of the charges against the alien.

[fol. 68] Counsel objected to the presence of newspaper reporters at the hearing. He pointed out that the Law does not provide for either an open or closed hearing and contends that it is not customary for the press to be present at deportation hearings. While the Immigration and Nationality Act makes no provisions for either open or closed deportation hearings, Section 236(a) of the Act provides for the conduct of exclusion hearings "separate and apart from the public." The omission of this wording in the section pertaining to deportation hearings would indicate that the Act does not contemplate that these hearings will be closed proceedings. Counsel's objection was overruled.

and the newspapermen were permitted to be present throughout the proceeding.

Counsel objected to the entire proceedings on the ground that Section 242(b) of the Immigration and Nationality Act is unconstitutional, null and void in that it does not meet the requirements or standards for a fair and impartial hearing and is violative of the provisions of the Administrative Procedures Act. In support of this objection he has submitted a brief wherein he sets forth at length the reasons for his objection, (Ex. 8). Counsel in his brief points out that the Supreme Court in the case of *Wong Yang Sung* v. *McGrath* (Feb. 20 and Mar. 13, 1950, 339 U. S. 33, 908) held that deportation proceedings against the alien were amenable to the Administrative Procedures Act. He further points out that Congress on September 27, 1950, negated this Supreme Court decision by exempting exclusion or expulsion of aliens from the provisions of the Administrative Procedures Act. Further, that this Act has now been specifically repealed by the Immigration and Nationality Act of 1952. He contends that Section 242(b) of the [fol. 69] Act does not meet the requirements for fairness and impartiality required by the Constitution and Laws of the United States because the investigative and prosecuting functions of the Special Inquiry Officer are commingled with his adjudicative functions and, further, the Special Inquiry Officer is responsible to the supervision of officers and employees of the Service engaged in the performance of investigative and or prosecutive functions for the agency. Section 242 of the Immigration and Nationality Act provides for the apprehension and deportation of aliens. Paragraph (b) of that Section provides that a Special Inquiry Officer shall conduct proceedings under this Section to determine the deportability of any alien. It provides that determination of deportability in any case shall be made only upon a record made in a proceeding before a Special Inquiry Officer at which the alien shall have reasonable opportunity to be present. It provides that proceedings before a Special Inquiry Officer shall be in accordance with such regulations as the Attorney General shall prescribe and that such regulations shall include requirement that, (1) the alien be given notice reasonable under all the circumstances of the

nature of the charges against him and of the time and place at which the proceedings will be held; (2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel authorized to practice in such proceedings as he shall choose; (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. All of these requirements have been met. Section 242(b) also provides,

> [fol. 70] "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

The provisions of the Administrative Procedures Act does not apply to these procedures. The procedure for determining the deportability of an alien is by law vested in the Immigration Service and that procedure is the sole and exclusive procedure for determining deportability. 8 CFR 9.1(b) reads, "The designation and appointment of Special Inquiry Officer. The Commissioner may designate, elect, and appoint as a Special Inquiry Officer any Immigration officer whom he deems specially qualified to exercise the powers and perform the duties of a Special Inquiry Officer as set forth in the Immigration and Nationality Act and this chapter. The Commissioner shall issue to each officer so appointed a certificate under his signature bearing a seal of the Service, such certificate shall state and shall be accepted in any proceedings as evidence that the officer to whom the certificate is issued has the authority to exercise the powers and perform the duties of a Special Inquiry Officer as provided in the Immigration and Nationality Act and in this chapter." The attorney attempted to examine the Special Inquiry Officer and has objected to the refusal of the Special Inquiry Officer to allow himself to be placed under examination. The certificate of designation of Special Inquiry Officer signed by the Commissioner was presented to the attorney for his examination. Regulations provide "*such certificate shall state*

and shall be accepted in any proceeding as evidence that the officer to whom the certificate is issued has the authority to exercise the powers and perform the duties of a Special Inquiry Officer as provided in the Immigration [fol. 71] *and Nationality Act and in this chapter.*" The Special Inquiry Officer is not required by law or regulations to submit himself to questioning by any attorney who wishes to challenge his designation as an Inquiry Officer. He is only required to submit a certificate issued by the Commissioner and bearing the seal of the Service to show that he has been designated and appointed as a Special Inquiry Officer. The record shows that the attorney did examine the certificate and was aware of the fact that the Special Inquiry Officer presiding at this hearing had been duly designated and appointed. Counsel further points out that the Special Inquiry Officer in conducting proceedings under the Immigration and Nationality Act is required to present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, as well as lodging and developing additional charges against the alien. He contends that this is prosecuting and investigative functions. It might be pointed out that in the instant case, an Examining Officer was assigned. Counsel also contends that the Special Inquiry Officer is unable to conduct a fair and impartial hearing because he is subject to the supervision of the Attorney General. He contends that the Inquiry Officer has been unduly influenced by newspaper articles released by the Attorney General and Immigration officials. Most of these objections made by the attorney were raised in the *Matter of D-A-*, 330 611 (Int. Dec. 330) (June 18, 1951) (December 28, 1951.) The attorney in that case objected to the Hearing Examiner because prior to his appointment the Hearing Examiner had for fourteen years or more served in various positions in the Service which included functions in an investigative, prosecutive, and supervisory capacity. The Board held, "Granted that this is so, however, we fail to see why it should be cause for dis- [fol. 72] qualification. If counsel's line of argument were pursued to a logical conclusion, no prosecuting attorney could ever be permitted to serve as a judge on the theory that having once engaged in prosecutive functions such a person would be unable to conduct a fair and impartial

hearing as a judicial officer." The Board pointed out that the important point was whether or not the Hearing Examiner had at any time in the past acted in an investigative or prosecutive capacity in that particular case. In the instant case, the Special Inquiry Officer was not asked the question as to whether or not he might have acted in an investigate or prosecutive capacity in this case. Had that question been asked, the answer would have been "no". The attorney in the *D* ——— *matter*, supra, contended that the Hearing Examiner, although appointed under the Administrative Procedures Act, was subject to the Loyalty Act and was bound to be under pressure in order to protect his employment. The Board ruled, "To accept this argument as valid would be tantamount to declaring that Government employees are so pervaded with fear and so intimidated that they are incapable of passing a fair and honest judgment in any matter involving a subversive issue." While the instant case does not involve a subversive issue, the inference has been made that the Special Inquiry Officer being responsible to the Attorney General would not be capable of passing a fair and honest judgment in the case. There is no basis for counsel's contention and no restrictions are placed upon the Spe l Inquiry Officer in his conduct of hearings other tha hat they be conducted in accordance with the Law and the regulations promulgated thereunder. Certainly the Attorney General expects these hearings to be conducted in accordance with the highest standards of fairness and impartiality and that [fol. 73] the decision rendered by the Special Inquiry Officer be rendered strictly in accordance with the evidence presented at the hearing.

Counsel has objected to this proceeding on the ground that Section 241(a)(11) of the Immigration and Nationality Act is unconstitutional, null and void, being ex post facto law violative of Article 1, Section 9, Clause 3 of the Constitution of the United States. This issue has been well settled by the Supreme Court in numerous decisions. In one of the leading cases, the Court stated, "However, even if the Act were found to be retroactive, to strike it down would require us to overrule the construction of the ex post facto provision which has been followed by this Court from earliest times. It always has been considered

that that which it forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure." *Harisiades v. Shaughnessy 342 U. S. 580, 72 S. Ct. (1952)* and cases cited therein. Counsel also cites the Harisiades case in his brief in support of his objection to this proceeding but states that they do not fall within the same category. He contends that the Respondent was caught unaware by the change in the Law and was not adequately forewarned of the consequences of his prohibitive acts. Certainly, the alien must have been aware of the possibility of criminal prosecution at the time that he committed these acts. The Supreme Court did not say that their decision in the Harisiades matter would have been other than the one rendered if the alien had not been adequately forewarned that his conduct was prohibitive and forewarned of its consequences. They merely pointed out that in that case he was adequately forewarned. The Supreme Court in the Harisiades case [fol. 74] stated, "It is contended that this policy allows no escape by reformation. We are urged to apply some doctrine of atonement and redemption. Congress might well have done so, but it is not for the judiciary to usurp the function of granting absolution or pardon. We can not do so for deportable ex-convicts, even though they have served a term of imprisonment calculated to bring about their reformation." Subsequent to the rendering of that opinion the Immigration and Nationality Act became effective. Section 244 (a) (5) of that Act provides that the Attorney General may in his discretion suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence in the case of an alien who is deportable under various criminal grounds for an act committed or status acquired subsequent to entry into the United States, provided the alien has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act constituting a ground for deportation and has been a person of good moral character during all that period of time. The Act also provided

that an alien who fell within that category might be granted the privilege of voluntary departure from the United States at his own expense in lieu of deportation, provided, he had been a person of good moral character for five years immediately preceding his application for voluntary departure. The Respondent and his attorney were advised of this form of relief and declined to make application. (25).

Counsel requested a postponement of any further action in this proceeding in order to give him an opportunity to request judicial review in accordance with Section 10 of the Administrative Procedures Act. This motion [fol. 75] was denied on the ground that Section 242 of the Immigration and Nationality Act sets forth the procedure determining deportability of an alien and that the procedure so prescribed is the sole and exclusive procedure for determining the deportability of an alien. The Law is certainly clear in this regard, and there appears to be no reason for any further discussion of this particular issue.

Respondent's final objection was to the warrant of arrest on the ground that the warrant contains two offenses where there has been only one conviction. The warrant of arrest was issued pursuant to Section 241(a)(11) of the Immigration and Nationality Act.

> "Section 241(a). Any alien in the United States (including alien crewmen) shall upon the order of the Attorney General be deported who—
>
> (11) is or hereafter at any time after entry has been, a narcotic drug addict, or who has at any time been convicted of a violation of any law or regulations relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulations governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, cocoa leaves, heroin, marihuana, any sort of derivative, or preparation of opium

[fol. 76] or cocoa leaves or isonipecaine, or any addiction forming or addiction sustaining opium."

The charges in the warrant of arrest are that he has been "convicted of the violation of a law relating to the illicit traffic in narcotic drugs," and "convicted of a violation of the law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana." Both of these charges are contained in paragraph 11. They both stem from a conviction under the Marihuana Act of August 2, 1937. He is not charged with being deportable because of two convictions but he is charged with being deportable on two different deportation charges.

Counsel for the Respondent and the Examining Officer concurred in offering into evidence a record of a sworn statement previously made by the Respondent before an Immigration officer. The Respondent in this statement testified as to his nativity and to his residence in the United States. He also testified with regards to several arrests as shown by a Federal Bureau of Investigation report exhibited to him at that time. He testified that he was arrested by the New Orleans Police Department on March 28, 1938, for narcotic violation and held for Federal authorities. (Ex. 2). The Respondent was questioned during the hearing with regards to this arrest and identified certified court records consisting of certified copies of Indictment, Conviction, and Sentence in the case of CARLOS MARCELLO in the United States District Court, Eastern District of Louisiana, New Orleans Division, on April 25, 1938, as pertaining to him. He further stated that he was convicted and sentenced as shown in the court record, (p. 19, Ex. 4). No objection was made to the introduction of the court record, [fol. 77] and the alien does not deny his conviction and sentence at that time. The indictment in this matter is for violation of the Marihuana Tax Act of 1937. The first count to the Indictment reads, "That one Carlos Marcello . . . on, or about the 6th day of December, 1937, at New Orleans, Louisiana . . . did then and there unlawfully, knowingly, fraudulently, and feloniously transfer to one Gilmore Failor a certain compound, manufacture, remedy, derivative, and preparation of marihuana, to wit, sixty-three and one-half ($63\frac{1}{2}$) ounces of bulk marihuana which said transfer of

said marihuana aforesaid was not made in pursuance of a written order of the said Gilmore Failor to the said Carlos Marcello on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, as required by Act of August 2, 1937." Count 2 reads "Carlos Marcello . . . on or about the 15th day of December, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court did then and there unlawfully, knowingly, fraudulently, and feloniously transfer to one Gilmore Failor a certain compound, remedy, derivative, and preparation of marihuana, to wit, three hundred sixteen and one-half (316½) ounces of bulk marihuana which said transfer of said marihuana aforesaid was not made in pursuance of a written order of the said Gilmore Failor to the said Carlos Marcello on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States as required by Act of August 2, 1937." The Respondent pleaded guilty to these charges in the District Court of the United States, Eastern District, Louisiana Division, on October 29, 1938, and was convicted on his plea of guilty of the offense charged in the Indictment, to wit: "Violation of the Marihuana Tax Act, 1937." He was sentenced to imprisonment for a period of one year and one day, (Ex. 4). [fol. 78] There is no question of the fact that the alien was convicted October 29, 1938, and sentenced to imprisonment for a period of one year and one day for violation of the Marihuana Tax Act of 1937. The only issue is whether or not he is now deportable under the Immigration and Nationality Act of 1952. Section 241(d) of the Act provides,

> "except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts by reason of which any such alien belongs to any of the classes enumerated in subsection (a) occurred prior to the date of enactment of this Act."

The first charge in the warrant of arrest is that the alien has been convicted of a violation of law relating to the illi-

cit traffic in narcotic drugs. Counsel has pointed out that at the time of the alien's conviction for violation of the Marihuana Act of 1937, his conviction was not included among the deportable offenses set out in section 156(a) Title 8 U.S.C.; that on June 28, 1940, Congress amended that section and added convictions of violations of marihuana laws to the other deportable offenses contained therein. Counsel contends that narcotic drugs and marihuana are treated under separate chapters in the Internal Revenue Code and that marihuana has never been made a narcotic by special order of the President of the United States. Chapter 23 of Title 26, Internal Revenue Code, relates to narcotics. Sub-chapter (a) pertains to "opium and [fol. 79] cocoa leaves." Sub-chapter (b) pertains to "opium for smoking." Sub-chapter (c) pertains to "marihuana." Marihuana is treated as a narcotic under the Internal Revenue Code. The Act of February 18, 1931, providing for deportation of aliens convicted for violation of any law regulating traffic in narcotics was amended June 28, 1940, to add marihuana to the list of narcotics contained in that Act. The Respondent has been convicted of the violation of a law that relates to the illicit traffic in narcotic drugs, to wit: Marihuana. Accordingly, he is deportable on the first charge contained in the warrant of arrest.

The second charge in the warrant of arrest is that the alien has been "convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marihuana." The offense stated in the Indictment to which the Respondent pleaded guilty was that he did "unlawfully, knowingly, fraudulently, and feloniously transfer to one Gilmore Failor a certain compound, manufacture, remedy, derivative, and preparation of marihuana." The wording of the Indictment leaves no question of the fact that the alien is clearly deportable on the second charge contained in the warrant of arrest. Both charges in the warrant of arrest are clearly sustained.

The Respondent originally entered the United States in 1910 and with the exception of the one brief visit to Mexico has remained in the United States continuously since that time. He is married to a native born citizen of the United States and has four native born children. He was offered

an opportunity to apply for discretionary relief but declined to make application. The record shows that he was arrested in 1929 and charged with "accessory before and after fact, [fol. 80] assault and robbery, Canal Bank, Algiers, Louisiana"; the charges were dismissed. He was arrested in 1930 and charged with assault and robbery, sentenced to nine to fourteen years in the penitentiary. He received a pardon for this offense from the Governor of the State of Louisiana on July 16, 1935. He was arrested in 1935 for a violation of the Internal Revenue Laws and the case was dismissed. He was convicted about August 20, 1951, in the District Court of the United States in New Orleans for contempt of Congress. This conviction was reversed by the Court of Appeals for the 5th Circuit. The Respondent has refused to specify any country to which he should be deported.

Findings of fact: Upon the basis of all the evidence presented, it is found:

1. That the respondent is an alien, a native of Texas, Arnica, a citizen of Italy;

2. That the respondent entered the United States for permanent residence at New Orleans, Louisiana, October 7, 1910;

3. That the respondent last entered the United States at Laredo, Texas, during 1936 or 1937;

4. That the respondent was convicted in the District Court of the United States, Eastern District of Louisiana Division, on October 29, 1938, on his plea of guilty of the offense of "violation of the Marihuana Tax Act of 1937";

5. That the offense for which the respondent was convicted was a violation of a law relating to the illicit traffic in narcotic drugs;

6. That the offense for which the respondent was convicted was a violation of a law governing and [fol. 81] controlling the taxing, sale, exchange, dispensing, and giving away of marihuana.

Conclusions of Law: Upon the basis of the foregoing findings of fact, it is concluded:

1. That under Section 241(a)(11) of the Immigration and Nationality Act of 1952, the respondent is subject

to deportation in that he has been convicted of the violation of a law relating to the illicit traffic in narcotic drugs, to wit: The Marihuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress;

2. That under Section 241(a)(11) of the Immigration and Nationality Act of 1952, the respondent is subject to deportation in that he has been convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana, to wit: The Marihuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress.

Order: It is ordered that the alien be deported from the United States in the manner provided by law on the charges contained in the warrant of arrest.

(S.) Fred P. McCleskey, Special Inquiry Officer.

[fol. 82] Before the Board of Immigration Appeals

Opinion and Order

Special Inquiry Officer

United States Department of Justice
Immigration and Naturalization Service

File: A2 669 541 New Orleans March 4, 1953
In re: Carlos Marcello, or, Calogero Minacari
In Deportation Proceedings
In Behalf of Respondent:

William C. Orchard, Attorney
204 Queen and Crescent Building
New Orleans, Louisiana

Charges:

Warrant: Immigration and Nationality Act of 1952—Convicted of the violation of a law relating to the illicit traffic in narcotic drugs; Immigration and Nationality Act of 1952—Convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana

[fol. 83] Lodged: None

Application: Motion to reopen

Detention Status: Released under $5,000 bond.

Warrant of Arrest Served: December 30, 1952.

Discussion: This record relates to a 43-year old married male, a native of Africa, a citizen of Italy, who last entered the United States at Laredo, Texas during 1936 or 1937. Hearing in this matter was conducted at New Orleans, Louisiana February 16, 1953 and on February 20 the alien was ordered deported on the grounds that he had been convicted of the violation of a law relating to the illicit traffic in narcotic drugs and that he had been convicted of the violation of laws governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana. Counsel for the alien has now submitted a motion for the reopening of this proceeding in order to allow the alien to apply for suspension of deportation. This motion will now be considered.

Counsel contends that the alien is eligible for suspension in that more than ten years has elapsed since the commission of the act constituting grounds for deportation; that he has been a person of good moral character during that period; that he first entered this country at the age of ten months and has resided here since that time and that his deportation would result in exceptional and extremely unusual hardship to the alien, his wife, and four minor children. The record of hearing shows clearly that the alien has resided in the United States since 1910, with the exception of a brief visit to Mexico in 1937. The record further [fol. 84] shows that the alien is married to a native-born citizen of the United States and that they have four native-born children. No inquiry was made with regard to the alien's character or to any hardship that might result from the alien's deportation as no application for any form of relief was made at the time of the hearing. The following testimony is taken from the hearing record:

Question by Special Inquiry Officer to attorney: "Mr. Orchard, the regulations provide that at any time during the hearing the Special Inquiry Officer may advise the alien and his counsel of any relief for which they make application. At this time I wish to advise you that you may, if you

desire, submit in behalf of the respondent an application for suspension of deportation based upon residence in the United States. In this case it would be ten years subsequent to the commission of an act constituting grounds for deportation, provided, of course, that he is able to establish that he has been a person of good moral character during that entire period and that his deportation would result in exceptionally and extremely unusual hardship either to himself or to a citizen or resident alien spouse or child. Further, you may, if you desire, submit in behalf of the respondent an application for the privilege of voluntary departure from the United States at his own expense in lieu of deportation, provided that the respondent is able to establish that he has been a person of good moral character for the past five years or longer. Do you understand these various forms of relief?" Answer: "Yes."

Question: "Do you wish to make an application for either or both of these forms of relief?" Answer: "No, Sir." (pp. 24, 25).

[fols. 85, 85a] Counsel apparently clearly understood the nature of the relief for which he might apply and he declined to make any application. He has set forth nothing in his motion to indicate any new facts or evidence that were not developed at the time of the hearing. The time to make application for suspension of deportation was during the hearing when the alien and his attorney were advised that such application might be made. The fact that counsel has changed his mind and now wishes to make an application is not sufficient grounds to order the hearing reopened. The motion to reopen will be denied on the grounds that the motion failed to state any new facts to be proved at the reopened hearing.

Order: It is ordered that the motion to reopen be denied.

(S.) Fred P. McCleskey, Special Inquiry Officer.

FPM:mi

[fol. 86]

Before the Board of Immigration Appeals

RESPONDENT'S EXHIBIT V

UNITED STATES DEPARTMENT OF JUSTICE
Federal Bureau of Investigation
Washington 25, D. C.

1910 Male, White

11-26-52 4151 jc
J. Edgar Hoover, *Director.*

The following FBI record, NUMBER 292 542, is furnished FOR OFFICIAL USE ONLY.

Contributor of Fingerprints	Name and Number	Arrested or Received	Charge	Disposition
Police Department New Orleans, Louisiana	Collis Marcello #13471	November 29, 1929	Accessory before after fact—assault and robbery, Canal Bank, Algiers, Louisiana	December 3, 1929 Affidavit dismissed
*	Carlos Marcello, Police Department, New Orleans, Louisiana, 1930, robbery; nine-fourteen years.			
State Penitentiary, Baton Rouge, Louisiana	Carlos Marcella #19754	May 28, 1930	Assault and robbery	Nine-fourteen years, January 12, 1934, paroled final discharge July 25, 1935 by pardon
Federal Jail New Orleans, Louisiana	Carlos Marcello #3032	February 17, 1935	Violation Internal Revenue Laws	Bonded February 18, 1935, case dismissed May 2, 1935
Narcotic Bureau Washington, D. C. #19039	Carlos Marcello #——, Police Department, New Orleans, Louisiana	March 26, 1938	Violation Marijuana Tax Act	October 29, 1938, one year and one day Atlanta Penitentiary
United States Marshal, New Orleans, Louisiana	Carlos Marcello #167	March 28, 1938	Selling marijuana	November 4, 1938 committed to United States Penitentiary, Atlanta, Georgia under sentence of one year and one day

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

]fol. 87]

Before the Board of Immigration Appeals

RESPONDENT'S EXHIBIT V

UNITED STATES DEPARTMENT OF JUSTICE
Federal Bureau of Investigation
Washington 25, D. C.

1910. Male, White

11-26-52 4151 jc
J. Edgar Hoover, *Director.*

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Contributor of Fingerprints	Name and Number	Arrested or Received	Charge	Disposition
Federal Jail New Orleans, Louisiana	Carlos Marcello #5856	March 28, 1938	Transporting marijuana without tax paid	Bonded March 30, 1938, October 29, 1938, one year and one day; transferred to Atlanta November 4, 1938 custody of United States Marshal
Narcotic Bureau Washington, D. C.	Carlo Marcello #19039	June 8, 1938	Marijuana Tax Act of 1938	Held on bond of $3000—no action taken
United States Marshal, New Orleans, Louisiana	Carlos Marcello #277	not given (print received October 31, 1938)	Sale marijuana	
United States Penitentiary, Atlanta, Georgia	Carlos Marcello #54650	November 4, 1938	Possession and selling untaxed paid marijuana—two counts	One year and one day, discharged by conditional release, August 18, 1939.
United States Marshal, New Orleans, Louisiana	Carlos Marcello #2071	March 17, 1944	B. P. A. violation	
United States Immigration and Naturalization Service	Carlos Junior Marcello #44/1094 New Orleans Louisiana	April 12, 1944	Violation of Immigration Laws	

[fol. 88]

Before the Board of Immigration Appeals

RESPONDENT'S EXHIBIT V

UNITED STATES DEPARTMENT OF JUSTICE
Federal Bureau of Investigation
Washington 25, D. C.

1910. Male, White

11-26-52 4151 jc
J. Edgar Hoover, *Director.*

The following FBI record, NUMBER 292 542, is furnished FOR OFFICIAL USE ONLY.

Contributor of Fingerprints	Name and Number	Arrested or Received	Charge	Disposition
United States Marshal New Orleans, Louisiana	Carlos Marcello #651	March 29, 1951	Refusal to testify before a Senate Committee	Pending
Alien Registration	Carlos Minacori #2669541	alien registration October 10, 1940		
Police Department New Orleans, Louisiana	Carlos Marcello #62018	not given (finger printed January 4, 1952)	vagrancy—pending investigation battery	January 8, 1952 affidavit refused on charge of investigation battery

[fol. 89]

* Carlos Marcello, Police Department, New Orleans, Louisiana, 1929, suspicion, dismissed.

* As Carlos Marcello, Louisiana State Penitentiary, 1930, accessory before and after robbery, nine-fourteen years.

* Carlos Marcell, Police Department, New Orleans, Louisiana, 1935, suspicion, dismissed.

* #13471, Police Department, New Orleans, Louisiana, January 7, 1935, assault and robbery, released.

* Carlos Marcello, United States Marshal, New Orleans, Louisiana, 1936, alcohol, dismissed.

* Police Department, New Orleans, Louisiana, Carlos Micelli, #13571, charge Act Fourteen of 1934, Narcotics, also held for Federal Authorities. March 28, 1938, turned over to United States Marshal.

* As Carlos Marcello, United States Penitentiary, Atlanta, 1939, Possession marijuana, one year one day.

* As Carlos Marcello, #13471, Police Department, New Orleans, Louisiana, November 29, 1940, no honest means of support; being ex-convict and dope peddler.

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

[fol. 90] BEFORE THE BOARD OF IMMIGRATION APPEALS

ORAL ARGUMENT—May 11, 1953

[fol. 91] Attorney Wasserman: Now, when you're dealing with a case where the Attorney General has in advance announced that he's going to deport a hundred so-called racketeers and has made up his mind in advance, before the hearing is even held, that the man is to be deported, how can you expect a fair hearing? How can you expect any one of his subordinates to rule other than for deportation?

Chairman: Mr. Wasserman, the Attorney General who made that announcement in October 1952 is no longer the Attorney General.

[fols. 92-93] Attorney: That is correct; but if you will look at current press releases—current mimeographed press releases by the Department of Justice—you will observe, as I have observed, that Mr. Brownell is following the policy of his precedessor to deport these so-called gangsters and racketeers; and I know of no change of policy. On the contrary, I can produce evidence to show affirmatively that the same policy is being pursued.

[fol. 94] I also have the feeling—and it's a feeling that's based upon evidence which we will supply—that the real basis for the denial of suspension here was the fact that Marcello was one of these hundred whom the Attorney General had named; and basing it upon whatever confidential information the Attorney General had in his possession to motivate him to place Marcello's name on this list, the [fol. 95] hearing officer denied suspension of deportation. That, of course, is directly contrary to the decision in the case of *Alexiou* v. *McGrath*, 101 F. Supp. 421.

[fols. 96-105] Mr. Scher: In respect to the Attorney General's program, as alleged by Mr. Wasserman, first of all, I think it's very commendable of the Attorney General to deport gangsters and racketeers. And the assumption made that any Attorney General would deport gangsters and racketeers regardless of the law, I don't think is proper. He took an oath of office, and if he made any such statements they must presumably have meant that he intended to deport gangsters and racketeers *if* they are deportable. The

sole issue is whether they are deportable, and not an Attorney General's program. It can in no way be conceived that an Attorney General would state that a person should be deported if the law provided otherwise.

[fol. 106] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 145

CARLOS MARCELLO, Petitioner,

vs.

JOHN M. BONDS, Officer in Charge, U. S. Immigration and Naturalization Service

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The original petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

The supplemental petition is denied.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.